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TO

SUPPLEMENTAL BRIEF OF AMICUS CURIÆ

(In support of the validity of the statute of California providing for the establishing and quieting of title in case of the destruction of public records).

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 230.

AMERICAN LAND COMPANY, A CORPORATION, COMPLAINANT AND APPELLANT,

vs.

LOUIS ZEISS, DEFENDANT AND APPELLEE.

SUPPLEMENTAL BRIEF OF AMICUS CURIÆ

(In support of the validity of the statute of California providing for the establishment and quieting of titles in case of the destruction of public records).

The questions certified by the Circuit Court of Appeals ask a determination by this court of the validity of the statute of California approved June 16, 1906, "to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records."

Any decision adverse to the validity of the statute would in its effects reach far beyond the parties to the case at bar.

The record title to the larger part of all real property in the city and county of San Francisco depends upon decrees rendered in proceedings under the act. More than twenty-three thousand suits to establish title have been brought under its provisions. Practically all transactions in real estate in San Francisco during the last four years have been made in reliance upon decrees entered in these proceedings. The ownership of, and liens upon, real property worth hundreds of millions of dollars are without public record or proof except such as has been established under the act.

These facts sufficiently explain why it has been thought proper to present to the court, with all possible fullness, the considerations which demonstrate that the statute is constitutional and affords "due process of law."

I.—This Brief is supplementary to that already filed by us herein.

At the last term, in partial response to a motion by appellant to advance the cause for hearing or to dismiss the certificate, we filed with this court copies of the "Brief Filed by Amici Curiæ in the Circuit Court of Appeals in Support of the Validity of the Act Here Attacked," and at the same time a compilation of certain "Burnt Record and Land Title" acts prepared by the Secretary of State of California. In the latter, the statute here involved is set out in full.

The brief filed by counsel for appellant follows, except in arrangement and in the accentuation of certain points, the lines of their brief in the lower court. In the main, therefore, our brief already filed covers the case as here presented. We ask that it be considered as our main argument here in support of the validity of the act. In what follows we shall endeavor to avoid a repetition of matters covered by the former brief, and shall summarize and supplement the latter only so far as necessary to render it a reply to the brief here filed for appellant.

II. The remedy provided by the act was necessitated by the destruction of all records in San Francisco; it employs every reasonable safeguard against abuse, has analogies in legislation repeatedly upheld, and in operation has proved the necessity for its enactment and the reasonableness of its provisions.

(A reply to various criticisms of the act contained in the "Statement of Facts" in the Brief for Appellant.)

"The Statement of Facts" which opens the brief for appellant departs at a number of points from its main purpose into criticisms of the act and of the influences which (it is suggested) moved the Supreme Court of California to uphold it.

The carefully considered opinions of that court are sufficient answer to an imputation that the act was upheld by it on any ground "of mere convenience."

It is suggested that the disaster of San Francisco, in April 1906, and the destruction of all official records, created no "necessity" for any remedy by which record title to land could be re-established. If this does not answer itself it is set at rest by the statement of the conditions caused by the fire contained in the opinion in Title Document and Restoration Company *vs.* Kerrigan, 150 Cal., 289, and by what has been said upon the subject in our earlier brief.

The best evidence of the necessity which prompted the act is the fact (already stated) that more than twenty-three thousand actions to establish title under its provisions have been instituted in San Francisco. Most of these have passed to judgment. Through them the titles to at least one hundred thousand parcels of land have been established, and those titles with the liens which rest upon them, made matter of public record. The property covered by these proceedings and depending upon them for record title, represents at least seventy-five per cent in area, and between eighty and eighty-five per cent in value of all real property in the city and

county of San Francisco. More than a million and a half dollars have been expended by the property owners of that city to avail themselves of the remedy provided, and to regain record proof of their ownership, and of the charges and liens which affect it. For four years practically all real estate transactions in San Francisco have been made in reliance upon titles thus established.

These facts dispose of the suggestion that the act met no necessity. They show as well the consequences of any decision by this court adverse to its validity and declaring void all decrees obtained under its provisions. So far as the welfare of San Francisco and of the State depends upon stability of titles to land, and freedom of commerce in real property, such a decision would be little less disastrous than the catastrophe which gave birth to the act. Apart from its effect upon the transactions of the past, it would return the largest city of California and the owners of property in it to a condition which cannot be better expressed than in the language of the Supreme Court of Illinois, describing the situation of property-owners in Chicago after the fire of 1871 as "appalling."

Smith *vs.* Stevens, 82 Ill., 554.

Among the criticisms of the act in this portion of appellant's brief (and one repeated many times before its end) is a complaint that California has not required all landowners seeking to re-establish their titles to pay to certain "abstract and title insurance companies" such sums as they might exact to furnish reports (based upon such memoranda as they saved from the fire) respecting the existence of possible unknown claimants. This most truly expresses the real objection of those who have attacked the act since its passage. Together with this complaint is an assertion in the brief that the memoranda saved by these various "abstract and title insurance companies" are complete and accurate. Even if this were a fact, it would be a fact unsupported by the record, and of which this court can have no knowledge.

Counter-assertion is perhaps no more proper, but the facts are that such memoranda as were saved by these companies are not complete, of their accuracy there can be no assurance, and they are merely the skeletonized and abbreviated notes of records kept by abstract companies generally. The point is obviously one which under no view affects any question of "due process of law." Whether these memoranda existed; if so, whether they were of such character as to render resort to them advisable or proper, and, finally, whether the State should compel all property-owners of San Francisco to yield tribute to "various abstract and title insurance companies," were questions addressed to the legislature, to be determined in the exercise of its discretion, and with which this court will not, we believe, concern itself.

One more point presented by the "Statement of Facts" warrants reply. Throughout appellant's brief it is said and suggested that the act was passed in "haste and panic," and (as if this blighted it entirely) it is characterized as "emergency" legislation. "Emergency legislation" it was, for, to paraphrase the language of the Supreme Court of Illinois in a case already cited, "The condition of property-owners in San Francisco after the great fire of 1906 was appalling, *demanding legislative interference.*"

Smith *vs.* Stevens, 82 Ill., 554.

The statute, however, was not drawn nor passed in "haste and panic." The laws of other States enacted with similar purpose, notably the Burnt Record act of Illinois and the Torrens acts of several States, furnished the framework of its provisions. Every care was taken to hedge the remedy with all reasonable safeguards against fraud or other abuse. The statute did not take effect for thirty days after its passage, which itself was two months after the fire. As originally enacted all actions authorized by it were required to be commenced before July 1, 1909. This has since been extended by the legislature (Stats. Cal., 1909, p. 163) to January 1,

1911, and the act will expire on that day. Actual possession of the land itself was made a condition precedent to any proceeding. Personal service was required in every case where personal service was possible. Constructive service was permitted only where no other service could be had, and was provided for not in one mode alone, but by every method of constructive notice known to the law, by posting upon the property, by recording, by platting upon official records, and by publication of process.

Since its enactment the act has been assailed by those who appear for appellant, and upon the same grounds here urged. Its validity has been repeatedly sustained.

In actual operation it has proved beneficial and useful to a degree hardly anticipated even by those who aided in its passage. Through it the stability of title to land in San Francisco has been restored, record titles re-established, and the present case, so far as we know, is the first and the only one in which any claimant has had even alleged rights finally foreclosed by a decree.

It is to be noted that this case involves no claim that fraud, actual or constructive, was employed in obtaining the judgment here assailed. The bill of complaint contains no allegation that the claims of those to whom appellant has succeeded would have been disclosed by due inquiry or diligence on the part of Zeiss, or that Zeiss in fact failed to make such inquiry or to use such diligence. All that is alleged is that appellant's vendors did not *evade* personal service. The brief for appellant (foot of page 7) expressly disclaims any suggestion of fraud and concedes it quite "possible that the appellee here proceeded in the State court in the belief that he was asserting a right actually vested in him."

If upon a trial of this suit it should appear that the predecessors of appellant, despite all provisions of the act as to notice, failed to receive actual notice of a proceeding affecting land in which (unknown to Zeiss) they claimed an

interest, and permitted a full year to pass after the rendition of the decree without taking steps which would have apprised them of the pendency of such proceedings, the case at bar must be classed either as one in which inattention to their own interests has brought about the result of which they complain, or as one of those cases, inevitable wherever constructive service of process is necessary, in which, despite every effort to afford notice, actual notice has failed to reach an unknown claimant.

> "A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to every one. It charges every one with knowledge of its provisions; of its proceedings it must at times adopt some form of indirect notice and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed must frame them and assume the care of property to be universal, if it would give efficiency to many of its exercises."
>
> Ballard *vs.* Hunter, 204 U. S., 247, 262.

If this be true in the ordinary case, it applies with tenfold force to proceedings such as those here involved, necessitated by a catastrophe of which the world had notice. As said of the similar act of Illinois (in language quoted at page 35 of our earlier brief):

> "It was demanded as a matter of safety in a great emergency. It was not calculated to take any reasonable being by surprise. It was known throughout the civilized world that a large part of the city of Chicago had been destroyed by fire and that the records of the courts and the records of deeds were all destroyed. This naturally commanded the attention of all reasonable persons everywhere and called upon them to attend and see what means would be adopted to mitigate the evils and dangers incident to the destruction. This legislation was not done in a

corner, but before the observation of the civilized world. We cannot doubt the power of the general assembly to pass the act."

Bertrand *vs.* Taylor, 87 Ill., 235.

III. The essentials of due process of law invoked in the brief for appellant are satisfied by the act.

On page 12 of appellant's brief three "cognate principles" are urged as rendering the statute invalid. They are stated as follows:

> "I. *Notice.*—To constitute due process of law in judicial proceedings involving adversary rights of property there must be adequate notice, giving a real and substantial, and not merely a formal and illusory, opportunity to controvert the plaintiff's allegations. This is axiomatic.
>
> "Roller *vs.* Holly, 176 U. S., 398.
>
> "II. *Parties and Privies*—A judgment in such cases can conclude the rights of parties and privies only. This is an 'immutable principle of natural justice.'
>
> "Hollingsworth *vs.* Barbour, 4 Pet., 466, 475.
>
> "III. *Res Judicata.*—This signifies 'that the court has after argument and consideration, come to a decision on a contested matter.' This is *'res judicata,'* according to the law of any civilized country.
>
> "Jenkins *vs.* Robertson, 1 Scotch App., 117.
>
> "See also—
>
> "Tregea *vs.* Modesto, 164 U. S., 179.
>
> "Of course, this means that there must be either an actual trial of contested issues or a default after due notice in a case in which an adversary is disclosed who may be served with notice."

Concerning the first and second of these nothing need be said. Both are elementary and undisputed. The third, while irrelevant, might be similarly passed, except for the

casuistry involved in the language requiring as essential to *res judicata* a case "in which an adversary is disclosed who may be served with notice." If persons sued as "unknown" claimants are "disclosed" and "may be served with notice," the principle may be taken as correct. If it is meant that a court cannot by judicial decree bind one sued as an "unknown" claimant to real property and served with process by publication, it is, as we have shown in our earlier brief and as we shall hereinafter show, untenable.

The matter contained on pages 12 to 17 of appellant's brief is a "summary of argument and index" to what follows. The points discussed on these pages may be best considered by a review of the arguments offered in their support.

IV. The act requires due diligence and inquiry to discover possible unknown claimants.

On pages 17 to 41 of appellant's brief it is argued that the statute fails to afford "due process of law," in that it does not require a plaintiff to endeavor to ascertain the existence of possible claimants before suing them by general designation. This, it is urged, renders the act invalid, "even within the extreme doctrine of the Massachusetts case" (referring to Tyler *vs.* Judges of Court of Registration, 175 Mass., 71; 55 N. E., 812).

Heretofore the act has been assailed by counsel for appellant primarily on the ground that a State is without power to conclude by judicial decree in a suit to quiet title one sued and served as an unknown claimant. That contention is answered by a mass of authority so great that the ground of complaint has shifted. We are now told that even though "unknown claimants" may be barred by judicial proceedings, "within the extreme doctrine of the Massachusetts case" (and we may add within the doctrine of every case deciding the question), the present act does not afford due process of law, because it requires no effort by a plaintiff to ascertain the existence and identity of possible claimants.

To this a conclusive answer is that the premise is untrue. The act as construed by the Supreme Court of California *does* require that the plaintiff make inquiry and exercise diligence to ascertain the identity of all who may claim an interest in or lien upon the property described in his complaint.

The Supreme Court of California in Title Document, etc., Co. *vs.* Kerrigan, 150 Cal., 289, said:

> "In this connection it may be well to notice the contention of respondents, that by the terms of the act now under consideration the plaintiff in the proposed action may include among 'unknown claimants' those who, with reasonable diligence on his part, might have become known to him. * * * But we think that, on a proper construction, *the act under examination does require the plaintiff to designate and to serve as known claimants all whom with reasonable diligence he could ascertain to be claimants.* It is not clear, as claimed by petitioner, that section 5 of the act requires *in the affidavit* a statement of the examination and inquiry made by plaintiff to enable him to aver that 'he does not know and has never been informed of' any person claiming adversely. But apart from the affidavit the evident purpose of the act is to secure, so far as possible, actual notice of the proceeding to all known claimants—by personal service if they reside and can be found within the State, by mailing if they cannot be so found or are non-residents. We have no doubt that where the statute is thus careful to secure actual notice to known claimants, *it should not be construed as intended to permit a plaintiff to wilfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. For the purposes of this statute the adverse claimants whom plaintiff 'knows or of whom he has been informed' include all as to whom he would, by reasonable inquiry, have had knowledge or information.* It is unnecessary to multiply authorities in support of the well-settled rule that 'the means

> of knowledge is equivalent to knowledge.' (Civ. Code, sec. 19; Wood *v.* Carpenter, 101 U. S., 135; Shain *v.* Sresovich, 104 Cal., 402 (38 Pac., 51). The rule applies wherever the circumstances impose upon the party the duty of inquiry (Bank of Mendocino *v.* Baker, 82 Cal., 114 (22 Pac., 1037); Prouty *v.* Devin, 118 Cal., 258 (50 Pac., 380), and *we are satisfied that the statute in question imposes upon the party seeking to proceed under it the duty of inquiry as to the names and residences of all persons who may claim an adverse interest in the property.* (Leigh *v.* Green, 64 Neb., 533 (101 Am. St. Rep., 592, 90 N. W. 255); Mulvey *v.* Gibbons, 87 Ill., 367 (citing further Farnham *v.* Thomas, 56 Vt., 33). So construed the statute does not, nor can an action prosecuted under it, deprive any person of his property without due process of law."

Again, in Hoffman *vs.* Superior Court, 151 Cal. 386, after holding that the statute requires the plaintiff in his affidavit to allege in terms "that he does not know, and has not been informed" of any adverse claimants whom he has not specifically named, it was pointed out that failure of the plaintiff to make inquiry or to avail himself of knowledge which would be imputed to him because of facts sufficient to put him on inquiry as to the existence of adverse claimants would be available

> *"in any subsequent attack upon the decree, upon the ground that there was extraneous fraud of the plaintiff in making a false affidavit to obtain jurisdiction."*

But, even if the Supreme Court of California had not already determined the question, there could be no doubt of the meaning of the statute. Under all statutes providing for service of process upon unknown claimants it is held that no person is such whose claims can by diligence be discovered.

In Leigh *vs.* Greene, 64 Neb., 533; 90 N. W., 255, this

question is discussed at length, and it is held that an unknown owner is one "whom the plaintiff is unable *with reasonable diligence and inquiry* * * * to ascertain."

One who appears of record as owner or claimant is not "unknown" within the meaning of such a statute.

Shepherd *vs.* Ware, 46 Minn., 174; 48 N. W., 773; 24 Am. St. Rep., 212.

Mulvey *vs.* Gibbons, 87 Ill., 367, 377.

Nunley *vs.* Blanton (Tex.) 126 S. W., 1110.

So where these statutes do not (as does the one here involved) require the *plaintiff* to be in actual possession before he may begin an action against unknown owners, it is held that a party in possession cannot be an "unknown" since due diligence would discover him.

State *vs.* Westfall, 85 Minn., 437; 89 N. W., 175.

Sellers *vs.* Simpson (Tex. Civ. App.), 115 S. W., 888.

The words "known" and "unknown" so employed are always held to refer to persons or things capable of being known with the exercise of reasonable diligence. The phrase "known property" means "property which by use of ordinary diligence might have been known."

Tucker *vs.* Welch, 12 Vt., 240.

Farnham *vs.* Thomas, 56 Vt., 33.

Moore *vs.* Quint, 44 Vt., 97.

"The means of knowledge are in effect the same thing as knowledge itself"

Wood *vs.* Carpenter, 101 U. S., 143.

The California Court, therefore, holds that although the act prescribes the form of a plaintiff's affidavit to be "that he does not know and has not been informed" of adverse claimants other than those named, *"for the purposes of this statute the adverse claimants whom plaintiff 'knows or of*

whom he has been informed' include all as to whom he would, by reasonable inquiry, have had knowledge or information." (Title Document, Etc. Co. *vs.* Kerrigan, *supra*). If, in fact, he has failed to make reasonable inquiry to discover and identify possible claimants, his affidavit is false, and that fact, as held in Hoffman *vs.* Superior Court (*supra*) is ground for vacating the decree as obtained by "extraneous fraud of the plaintiff in making a false affidavit to obtain jurisdiction."

It is true, as there held, that the falsity of the affidavit would not deprive the Court of jurisdiction. It would render the decree voidable on direct attack. This result, it is elementary, follows in every case of fraud and would be equally true whatever form of affidavit the Legislature might prescribe.

The argument of counsel for appellant concerns itself almost entirely with the form of the affidavit. The form of affidavit required of plaintiff was entirely within the control of the legislature, and touches no question of "due process of law." A legislature could dispense entirely with any *affidavit* for publication, and the proceeding nevertheless afford due process of law. Especially is this true where, as under this act, the remedy is "against the world," and publication of process is therefore essential in every instance. The need for publication does not depend upon proof by affidavit; it is inherent in the remedy. Whatever the form of the affidavit no claimant is "unknown" within this statute whose claims could by reasonable inquiry have been disclosed. "Due process of law" depends upon "reasonable notice and an opportunity to be heard," not upon the requirement or form of an affidavit preliminary to publication, or any particular form of procedure.

Hurtado *vs.* California, 110 U. S., 516.

> "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction (citing cases) and that there shall be

> notice and opportunity for hearing given the parties (citing cases). Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."
>
> Twining *vs.* New Jersey, 211 U. S., 78, 110-111.

In the course of its discussion of this point the brief for appellant reviews certain cases involving the validity of the Torrens act of Massachusetts, Illinois, and Minnesota. In these statutes provision was made for an examination of official records to discover adverse claimants, and it is suggested that such acts were sustainable (if at all, for under appellant's view they cannot be sustained at all) only because of these provisions. It is true that in these opinions reference is made to the precautions taken to discover and identify claimants. It is not true that any of the statutes were held or regarded as dependent for their validity upon such provisions. In every instance the question involved was whether the State had power by a judicial proceeding and by publication of process to bind unknown claimants.

The courts of Massachusetts, Illinois and Minnesota (as well as the courts of other States) decided that question in the affirmative. The Illinois court referred to the general law of that State (entirely apart from the Torrens statute) for the remedy by which unknown owners might be bound by publication (People *vs.* Simon, 176 Ill., 165, 176). The Ohio statute was held invalid because known resident owners of the property need not be given notice except by publication addressed "to whom it may concern."

State *vs.* Guilbert, 56 Ohio St., 575, 618.

In practically all of the statutes authorizing the joinder of unknown owners (in suits to quiet title, for partition,

etc.) there are no provisions for the discovery or identification of such persons beyond those contained in the act under review. Only if "unknown" in the legal sense—unascertainable by due inquiry—can they be sued as unknown.

The precautionary provisions to which counsel for appellant refer, requiring examinations of the official records or certified abstracts thereof by examiners of title, assume, of course, the existence of such records. A provision of this sort would be both futile and absurd in a stattue, the sole purpose of which was to provide for the re-establishment of record title "in case of the loss and destruction of public records."

In the discussion of this proposition, as in other places in the brief, the act is assailed for various supposed defects which have no reference either to "due process of law" generally or to any right of appellant in the case at bar. Complaint is made that the act does not require process to be served upon adjoining land-owners. Appellant does not claim to have been an adjoining land-owner, and this defect (if it were a defect) in the statute is wholly irrelevant to the case.

So, although the absence of fraud in this case is conceded (foot page 7, brief for appellant), numerous possible frauds are suggested by which the remedy might be abused. It is, for instance, said that an owner, having notice of certain claims, could deed to a dummy, who, blinding himself to all avenues of information, would make the affidavit, obtain a decree by fraud, and reconvey the property. Most, if not all of the devices suggested, involve perjury as well as fraud on the part of a plaintiff. The remedy in such a case, when it arises, will be that available wherever perjury and fraud are employed to obtain judicial decrees—a direct attack on the judgment.

The propriety of such action was expressly pointed out by the California Supreme Court in the Title Document case, 150 Cal., 289, and in Hoffman *vs.* Superior Court, 151 Cal.,

386. It is the remedy available under the Torrens acts, whether or not they contain provisions expressly excepting decrees obtained by fraud from conclusive effect.

Baart *vs.* Martin, 99 Minn., 197; 108 N. W., 945; 116 Am. St. Rep., 394.

Upon a showing of fraud such as would infect all of the devices suggested in the brief of appellant, a court of equity might, without even vacating the judgment, restrain its use as by estoppel,

Martin *vs.* Parsons, 49 Cal., 94,

or charge the party by whose fraud it has been obtained as trustee for the defrauded party with respect to the title so established.

See Bacon *vs.* Bacon, 150 Cal., 477; 89 Pac., 317.
Sohler *vs.* Sohler, 135 Cal., 323.

When such a case arises ample relief will be available. The present is not such a case.

On page 40 of their brief counsel revert to their objection that the statute does not require all property owners of San Francisco desiring to re-establish their titles to consult memoranda owned by the "various abstract and title insurance companies of San Francisco" to learn of possible adverse claimants. This has already been discussed.

In this connection an erroneous statement is made in appellant's brief. The abstracts of title made secondary evidence by the California legislature in the statute quoted on page 40 of that brief, are not, as it states, the memoranda or skeleton office abstracts now in the hands of "various abstract and title insurance companies," but "issued and certified" abstracts of title "prepared and made in the ordinary course of business prior to such loss or destruction" (of public records). The statute refers to such abstracts as were prepared before the fire and saved from destruction by those to whom they had been "issued and certified."

This has been expressly held by the Superior Court of the State in San Francisco. In a case decided February 2, 1909 (Dahler *vs.* All Persons, etc.), that court held inadmissible an abstract prepared since the fire from the memoranda forming the files of a title insurance company. The statute was, after careful consideration, held (per Sturtevant, J.) to contemplate only abstracts "issued and certified" prior to the destruction of the records, and not to include an abstract made from "a sort of typewritten pamphlet on which it (the company) had made certain memoranda," which itself had "never been issued," but is now and has been ever since it was prepared "one of the files of the title company."

V. The power of a State to provide for the establishment and quieting of title to land upon reasonable notice to all claimants, known and unknown, is settled. The act fulfils every requirement of due process of law in such a proceeding.

The next point in appellant's brief (pages 42 to 47) is that the "rule of the Massachusetts case (Tyler *vs.* Judges) notwithstanding its safeguards, is not sustainable as providing due process in a case in which the citizen has been deprived of property without effectual notice."

Briefly stated, the argument is that there exists no "necessity," and therefore no power in a State to provide a judicial proceeding to discover and determine the validity of unknown claims to real property within its borders. The discussion of this point occupies, under various forms of statement, nearly the whole of appellant's brief, and practically all of our earlier brief is in reply to this contention. It is unnecessary to repeat that discussion here. It will, however, avoid unnecessary repetition and perhaps be helpful to the court to briefly summarize at this point the prin-

ciples which dispose of it, and to supplement somewhat the discussion of it in our main brief.

No right of a State is more undoubted or more essential than its power to provide for the settlement of title to land within its borders. This is an incident of its sovereignty, essential to the "well being of every community;" "the duty of accomplishing it is local in its nature;" it is "not a matter of national concern or vested in the General Government," and no proceeding which the State provides for the purpose "can be declared invalid unless in conflict with some special inhibitions of the Constitution, or against natural justice."

Arndt *vs.* Griggs, 134 U. S., 316.

To accomplish this, it is necessary that the claims of non-residents as well as of residents of the State be reached and determined. Personal service is in such cases impossible, and it has become elementary that a State may by its control over the *res* (the land), and by reasonable constructive service of process, reach and conclude such claims.

The principle which thus operates to sustain proceedings against those who as non-residents are beyond the jurisdiction of the State, applies with equal force in the case of unknown claims. Undisclosed and unknown claims are fraught with greater danger to the stability of titles than any other class. The power and duty of a State by judicial proceedings and upon reasonable notice to quiet title to land within its jurisdiction as against unknown claimants, may be said to be settled beyond dispute. In the language of this court, it has power—

> "to provide for determining and quieting the title to real estate within the limits of the State and within the jurisdiction of the court *after actual notice to all known claimants and notice by publication to all other persons.*'
>
> Hamilton *vs.* Brown, 161 U. S., 256-275.

The instances in which the several States of the Union have for years exercised this power are almost innumerable. On page 116 of the brief heretofore filed by us reference is made to a list and classification (prepared by the Attorney-General of Massachusetts) covering such statutes in thirty-nine jurisdictions. In investigating the questions presented by this case it has become apparent that the list does not embrace even half of such statutes. There are but few States in which the reported cases do not involve legislation of this nature. The laws of many authorize the joinder of "unknown" claimants as defendants in suits for partition. Similar provisions in suits to quiet title in foreclosure, etc., are equally numerous. We may leave out of view all of the many statutes providing for suits against "unknown heirs," by general designation, all of which concern probate, escheat, tax title, or other similar cases (and which are sought to be distinguished by appellant on a variety of grounds)—the number of such statutes as to which no attempt at distinction is made—the frequency of cases in which their validity has been upheld, and the larger number in which it has been assumed as beyond question, show how widely exercised and how well settled is the power of a State by a judicial proceeding and after reasonable notice, to remove from property within it the menace of undisclosed and unknown claims. Of these statutes and cases many are referred to in our main brief and reference will hereinafter be made to others.

> "Action to establish a title conclusively in a certain person against all possible adverse claimants, known or unknown, *is no novelty in our States. The principle of it is recognized in most, if not all, of them.*"
>
> 4 Harvard Law Review, 280.

Among the acts which most closely resemble in purpose the one here under discussion are those establishing the Torrens system of land title registration. The first step in

the registration of titles under all of these is a judicial proceeding to adjudicate the applicant's title to the land and to determine the liens upon it "against the world." The Torrens system with this feature is, in one form or another, today the basis of land titles in Australia, Denmark, Austro-Hungary, many of the cantons of Switzerland, the county of Middlesex, England, and largely in Canada. In this country it is in force in California, Colorado, Illinois, Massachusetts, Minnesota, New York, Oregon, and Washington. It obtains as well in Hawaii and the Philippine Islands. In Hawaii the registration of titles under such acts has been compulsory as to all lands owned by corporations since 1903. In the Philippines it has been compulsory as to all lands patented since February 1, 1903, when the act went into effect.

There are at hand no statistics later than December, 1907. At that date 2,400 applications for registration under the Torrens system had been filed under the Illinois statute in Cook County alone, of which only 209 remained pending. In Massachusetts property of the value of over nineteen million dollars had been registered. In Minnesota two counties had furnished approximately one thousand applications for registration, and by June 30, 1907, 3,256 such applications had been entertained under the Philippine Islands act, covering property of an assessed valuation of more than twenty million dollars.

(See "Report of New York Commission on Torrens System of Registering Titles," 1908, and "Land Title Registration," an address by Henry Pegram before the New York State Bar Association, 1908, vol. XXXI, Reports of the Association, p. 282 *et seq.*)

The early Torrens act of Ohio was held unconstitutional in State *ex.* Guilbert, 46 Ohio St., 575; 47 N. E., 551, not upon any ground here applicable, but because the statute provided for no process of a court, and did not require

known resident claimants to be named or served except by publication of a notice addressed "to whom it may concern." This was held not to be due process of law. The Ohio case conceded and expressly declared the principle—

> "that the State may provide for the adjudication of all adversary rights of persons in property within its borders, and to the end that such jurisdiction may be complete, the Legislature may provide a substituted service of process for cases in which actual service cannot be made. In such cases nothing more is required by the law of the land than that the substituted service shall be such as in the exercise of legislative discretion shall be found most apt to accomplish the purpose of actual service. Shepard *vs.* Ware, 46 Minn. 174; 48 N. W. 773; 24 Am. St. Rep. 212."

The case cited Shepherd *vs.* Ware, 46 Minn., 174) is one which fully discusses and in the strongest terms upholds the right of a State by constructive service of process to reach and bind the claims of all persons, *known and unknown*, to land within its borders.

The only other case in which a Torrens act has been held invalid is People *vs.* Chase, 165 Ill., 527, which involved the first Torrens act of Illinois, passed in 1895. The case was decided upon the ground that, in violation of the State fundamental law, the statute required a merely ministerial officer, a registrar, through an examiner employed by him, to determine the validity of the applicant's title. This was held to be a function essentially judicial, and one which, under the State constitution, was not performable by a ministerial officer.

The later act of Illinois avoided this defect, and was upheld in People *vs.* Simon, 176 Ill., 165; 52 N. E., 910; 44 L. R. A., 810. Since the case of People *vs.* Chase it has been uniformly held (and recognized in all subsequent enactments of this class) that a remedy such as is here urged by appellant to be "non-judicial," "administrative," etc., is so

essentially "judicial" that (instead of involving functions "which no court of justice acting as such would administer") it *must* be administered by a court. (See page 211 of our earlier brief.)

In People *vs.* Simon, 176 Ill., 165; 52 N. E., 910; 44 L. R. A., 810, the validity of the present Torrens act of Illinois was under review. It was claimed that the act did not afford due process of law, because it authorized judgment against a known resident claimant upon mere constructive service. The court made answer as follows:

> "The act does contemplate, in some contingencies at least, actual personal service, *and the general law provides for publication as to unknown owners and persons in interest* and non-residents. *An applicant may proceed in this way, and in strict accordance with the act, obtain a decree or finding as to his title, which will be binding beyond all question,* so that even if a proper construction of the provision were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect; in which event, only the particular provision would fail, and not the whole law."

Other language in the opinion was directed to the meaning and effect of an anomalous phrase in the act which in "literal meaning" purported to make the decree conclusive on all persons "whether personally served, notified by publication, *or not served at all.*" Here again the court observed that even if such language were given its literal meaning, it "would be possible to carry out the purposes of the act without violating the Constitution in the respect complained of;" referring, of course, to the provisions of the general law already mentioned in its opinion, "providing for publication as to unknown owners and persons in interest and non-residents," and by which a decree might be obtained "binding beyond all question."

In the numerous later cases involving the Illinois statute,

its general validity has been uniformly treated as determined by People *vs.* Simon (see McMahon *vs.* Rowley, 238 Ill., 31; 87 N. E., 66), and the applicant, as a condition to obtaining a decree conclusive on the world, is required to show a title "good as against the world."

Gloss *vs.* Holberg, 220 Ill., 167; 77 N. E., 80.

The extent to which the Illinois statute has been employed is indicated by the number of reported cases involving its provisions.

See 34 Cyc., 600-606, and Illinois cases cited.

The Torrens act of Massachusetts was sustained as valid in Tyler *vs.* Judges of Court of Registration, 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433. The majority opinion, rendered by Mr. Justice Holmes, fully considers and, we submit, puts beyond question the power of a State to provide for the discovery and determination of unknown claims by a judicial proceeding and upon constructive service of process. The case is so fully quoted and discussed in our main brief as to make unnecessary its reconsideration here.

The validity of the Torrens act of Minnesota was upheld by its Supreme Court in State *vs.* Westfall, 85 Minn., 437; 89 N. W., 175. It was observed that decrees obtained in judicial proceedings against all persons, known and unknown, *"are not novelties in our jurisprudence,"* but *"have been repeatedly held to be conclusive on the whole world,"* and jurisdiction by such decrees to clear and quiet title was declared *"no longer an open question* in this State."

Appellant's brief dismisses the case of State *vs.* Westfall as containing mere dicta, "since nobody had been or was being hurt." It might easily be shown that the questions there determined were directly involved, but the law has been applied in cases concerning which no such suggestion is possible. See, for example:

Doyle *vs.* Wagner, 122 N. W., 316 (holding a lienholder bound by a decree rendered against him as an unknown claimant.)

The Torrens act of California was upheld in Robinson *vs.* Kerrigan, 150 Cal., 289, the attack upon it being led by those who here appear as counsel for appellant. All of the propositions here urged against the act of 1906 were presented, considered by the court, and in a lengthy opinion answered.

The Torrens act of Colorado was upheld as valid in People *ex rel.* Smith *vs.* Chrissman (Col.), 92 Pac., 949. At the time of that decision it seems to have been assumed that prior authorities had settled the general powers of the State invoked by the remedy, and no question was made of its right to provide a proceeding which by reasonable constructive service of process would reach and bind the claims of unknown persons.

The Torrens act of Oregon and Washington have not, so far as we know, been considered by the courts of those States.

In the reports of the courts of Hawaii and the Philippines cases involving the operation of the land registration acts of those territories are numerous. In both "due process of law" is required by their fundamental laws; in Hawaii by congressional act making applicable the provisions of the Federal Constitution (act April 30, 1900, ch. 339; 31 Stat. L., 141); in the Philippines by express enactment (act July 1, 1902, ch. 1369; 22 Stat. L., 691).

In Carino *vs.* Insular Government, 212 U. S., 449, a writ of error was issued to review a judgment of the Supreme Court of the Philippine Islands involving an application for the registration of certain land. In holding that a writ of error and not an appeal was proper this court said:

> "The proceeding for registration is likened to bills in equity to quiet title, but it is different in principle. It is a proceeding *in rem* under a statute of the type of the Torrens act, such as was discussed in Tyler *vs.* Registration Ct. Judges, 175 Mass., 71; 51 L. R. A., 433; 55 N. E., 812."

The Torrens act of New York, passed in 1908, went into effect February, 1909. We know of no case in which its constitutionality has been involved. The statute was passed only after a most careful investigation of its validity. Pursuant to an act of the legislature, Governor Hughes, in 1907, appointed a commission to examine and report upon the Torrens system. One of its members, Mr. Alfred G. Reeves, the author of Reeves on Real Property, was chosen to examine and report upon the constitutionality of the proposed measure. His report, itself an exhaustive brief upon the questions here presented, forms a part of the report of the commission made in 1908.

The main point considered in it is the right of a State by judicial proceedings to provide for the discovery and determination of the rights of unknown claimants to real property within its boundaries. This is first considered in the light of the law of New York. Reference is made to the numerous statutes of that State providing for the determination of rights of unknown claimants upon constructive service of process, and to the cases decided by the courts of New York upholding such proceedings as valid. The next question considered is whether such a proceeding affords "due process of law" under the decisions of this court. That question is also answered in the affirmative. The cases in this court are reviewed and shown (page 67)

> "clearly to sustain the conclusion that publication of notice to unknown persons as such, if conducted in the best manner reasonable and possible and pursuant to local statute, constitutes due process of law for the purpose of divesting them of interests in real property within the court's jurisdiction."

Passing now from the class of legislation exemplified by the various Torrens acts, we come to the great variety of statutory proceedings by which the rights of unknown claimants have for years, and in practically all jurisdictions, been determined. Of such statutes the one which in pur-

pose most nearly resembles the act under review is the Burnt Record Act of Illinois (Rev. Stat. Ill., 1874, p. 838). It provided for the re-establishment of record title made necessary by the destruction of public records. It required a plaintiff to name all known claimants to the land; it made all other persons defendants by the name or designation of "whom it may concern." (See Compilation of Land Title and Burnt Record Acts, heretofore filed.)

Its validity has been sustained and recognized by the Illinois courts, by the lower Federal courts, and by this tribunal. (See Gormley *vs.* Clark, 134 U. S., 338; 10 S. Ct. Rep., 554, and cases cited in main brief.)

It would be impracticable, and we believe unnecessary, to attempt a complete review of the statutes (found in almost every State of the Union), providing in various classes of proceedings for the joinder and service of "unknown owners." Pages 113 to 145 of our earlier brief are taken up with a review, admittedly incomplete, of cases involving such legislation. We shall cite but a few recent cases of similar character.

In Lawrence *vs.* Hardy (1909), 151 N. C., 123; 65 S. E., 766, one joined as an unknown owner in a proceeding for the partition of land and served by publication was held cut off by the decree from claiming any interest in the property adverse to the purchaser at the partition sale. The opinion is excellent, but does not lend itself to quotation except at length. The case is valuable as being one of the class alone recognized by counsel for appellant as authoritative; those in which the rights of an "unknown owner" affected by such a decree were directly involved and held concluded.

A comparatively recent case decided in this court is Ballard *vs.* Hunter, 204 U. S., 241. Publication was made against unknown owners, designated as such, in a suit under the law of Arkansas to enforce collection of a levee assessment. This was held to afford "due process of law."

"* * * It was said, however, that Josephine Ballard was not made a defendant in the suit, though the records of the county show that she was an owner thereof. But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem,* and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case.

"It should be kept in mind that the laws of a State come under the prohibition of the fourteenth amendment only when they infringe fundamental rights. *A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to every one. It charges every one with knowledge of its provisions; of its proceedings it must at times adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns, or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal if it would give efficiency to many of its exercises.* This was pointed out in Huling *vs.* Kaw Valley R. & Imp. Co., 130 U. S., 559, where it was declared to be the 'duty of the owner of real estate who is a nonresident to take measures that in some way he shall be represented when his property is called into requisition, and if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.'"

For other cases not cited in our former brief involving statutes permitting proceedings against "unknown owners," see—

Savage *vs.* Grey, 96 Me., 557; 53 Atl., 61 (in suits for partition).

Hess *vs.* Webb (Tex. Civ. App.), 113 S. W., 618 (in partition proceedings).

Winn *vs.* Campbell (Ark.), 126 S. W., 1059 (in suits to foreclose State liens).

Nunley *vs.* Blanton (Tex.), 126 S. W., 1110 (in tax proceedings).

Howell *vs.* Garton (Kan.), 108 Pac., 844 (suits to quiet title against unknown heirs by general designation).

Kircher *vs.* Keating & Sons Co., 144 Ill. App., 1 (in suits to foreclose mechanics' liens).

Sellers *vs.* Simpson (Tex. Civ. App.), 115 S. W., 888 (in suits to foreclose tax liens).

See also in this connection Parks *vs.* Crockett, 61 Me., 489, and Sheridan vs. Ireland, *Id.*, 486 (involving proceedings "against the world" to enforce liens upon logs).

We have discussed at such length the cases involving Torrens acts and other proceedings against unknown claimants because in every instance where an unknown claimant is sued practically all of the elements are present which are here urged as rendering the act under review invalid.

Of the statutes of this character some relate to taxation, eminent domain, and escheat proceedings. Appellant seeks to distinguish these on various grounds. These cases, like all others involving suits against unknown owners, show that the joinder of such parties does not render a proceeding "non-judicial" or *"ex parte"* and vindicate the propriety and necessity in appropriate cases of reaching and concluding undisclosed claims by constructive service of process. But

any number of statutes provide for the joinder of unknown claimants in proceedings for partition, to quiet title, in foreclosure and analogous cases, and to these even the attempted distinctions cannot apply.

In every case where a claim is unknown there is the same element of lack of "controversy" so frequently referred to and so dwelth upon in the brief of appellant. This is true whether those sued as "unknown owners" are sole defendants or are joined with named defendants, for, as pointed out by Mr. Justice Holmes in Tyler *vs.* Judges, 175 Mass., 71; 55 N. E., 812, the joinder of other persons can do no good to those sued by general designation, since *they* are not named. In all of the cases involved such proceedings not one suggests them to be *"ex parte"* or "non-judicial."

On pages 47 to 55 of appellant's brief is a discussion of the character of proceedings *quasi in rem* and of the action of foreign attachment by the ancient custom of London. Whatever is at all relevant in this discussion has already been considered at length in our earlier brief.

On page 54 it is urged as a defect of the statute that it permits non-adversary interests to be concluded by the judgment. The statute is not capable of such construction, nor is the question here involved. The appellee claimed as owner in fee; the appellant claims a revisionary interest in the same land. These claims were certainly adverse. We are told that by the act a—

> "mortgagor may thus get rid of his mortgage; a lienor of his lien; a trustee of his trust, and as in this very case, a tenant may acquire the fee—and without serving the parties interested or even naming them or mentioning their interests to the court."

No remedy can be devised by a legislature which cannot be abused by the employment of fraud and the commission of perjury. But it must be a rare case indeed in which a mortgagor, a lienor, a trustee, or a tenant cannot be shown to have "known or been informed" (and this, as we have

seen, includes all facts ascertainable by due inquiry) of the claim of his mortgagee, his lienholder, his beneficiary, or his landlord. If this can be shown, a decree obtained by him "without serving the parties interested or even naming them or mentioning their interests to the court," would, under the California and other cases already cited, be promptly set aside for fraud. Under every statute of this nature, and even without express provision, such a fraud is held to invalidate any judgment obtained by its employment. Baart *vs.* Martin, 99 Minn., 197; 108 N. W., 945; 116 Am. St. Rep., 394.

On pages 57 to 63 is a discussion under the heading that "no reasonable notice can be imparted by a publication not naming or describing the person to be cited, and making no allegation against him." Of course one sued as an unknown claimant to land particularly described in the summons is "described." To the contention urged under this heading every case dealing with proceedings against unknown owners is an answer. The authorities cited in its support discuss the *misnomer of named defendants*. Nothing further need be said, except that it is not the function of notice "to make allegations" against a defendant.

VI. The proceeding prescribed by the act is not "ex parte" and is "judicial."

Pages 63 to 96 of appellant's brief discuss the proposition that "a declaration of rights upon mere *ex parte* application is not the exercise of judicial power. The property of appellant cannot be transferred to appellee except by the exercise of judicial power."

Of our earlier brief practically all of the matter following page 179 is in answer to this. The proceeding provided by the act of 1906 calls for the exercise of judicial power, however defined. A suit to discover all claims, known and unknown, and establish and quiet title against them, made

after personal service of summons upon all named defendants, and service of process by publication upon all sued by general designation, can hardly be described as "*ex parte.*" (See page 243 of our earlier brief.) In the discussion of this point the brief for appellant is exactly the same as that filed in the lower court, and what is said upon the subject in our earlier brief we think sufficiently disposes of it. There are but one or two matters as to which a word may properly be added.

If any "injury" were essential to support the proceeding provided by the act, it is supplied by the destruction of public records. This deprived all land owners of public or record proof of their title, rendered their lands unmarketable, and exposed them to the possibility or even probability of false claims, which the loss of their proofs of title and the passage of time might make it impossible to refute. This is the same "injury" that is the basis of the ordinary equity suit to restore a lost or destroyed instrument. The remedy in either case may not arise from an actual "wrong" by the defendant. The defendant did not destroy the records in the one case nor the instrument in the other. But the law affords the party whose title is clouded by such destruction a remedy, and this confers upon him a cause of action. California certainly has the right to declare that a destruction of public records casts a cloud upon and exposes to danger land titles dependent upon such records for proof of validity, and has power to prescribe a remedy, which is really but an adaptation and extension of the *quia timet* jurisdiction of equity.

As said by the Supreme Court of California:

> "The action here involved may well, as claimed by petitioner, be regarded as a suit to remove a cloud upon titles, the legislature having power to declare what shall form such cloud (Clark *vs.* Smith, 13 Pet., 195), and having in effect declared by this statute

that the destruction of public records casts a cloud upon title."

Title, etc., Restoration Co. *vs.* Kerrigan, 150 Cal., 289, 321.

"Kentucky has the undoubted power to regulate and protect individual rights to her soil *and declare what shall form a cloud on titles*, and having so declared, the courts of the United States by removing such clouds are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country."

Clark *vs.* Smith, 13 Pet., 195.

The claim that whatever proceedings a State may prescribe no court can exercise judicial power unless a plaintiff alleges that a defendant has actually done or threatened a wrong to him is plainly untenable. What "wrong" by the defendant gives to a court jurisdiction in partition? The plaintiff in a partition suit does not allege against any defendant, known or unknown, that he has either done or threatened a wrong. He seeks merely a "remedy afforded by the law." It has never, we believe, been suggested that a partition proceeding was "non-judicial" because it "involved no controversy" or because the defendant was "not alleged to have either done or threatened a wrong." Judicial power is called into action whenever there is "a lawful demand of one's right in the form given by law." Actions or suits embrace "any proceeding by a party in a court of justice, seeking a remedy which the law affords." (See cases cited, p. 203 of our earlier brief.)

Eminent domain in itself is a "prerogative" power, an incident of sovereignty, but the ordinary proceeding in eminent domain is none the less judicial. Yet it is nothing more than a plaintiff seeking a remedy given him by the law.

"In condemnation proceedings the words 'plaintiff' and 'defendant' can be used only in an uncommon and liberal sense. *The plaintiff complains of*

nothing; the defendant denies no past or threatened wrong."

Mason City, etc., R. Co. *vs.* Boynton, 204 U. S., 570, 579.

Of the various proceedings by which the rights of all claimants, known and unknown, are concluded, the most widely applied and those which first suggest themselves to the mind are probate proceedings. We are told in the brief for appellant that probate proceedings are "non-judicial" and are sustainable only as an exercise of prerogative jurisdiction. It is unnecessary to multiply authorities to the effect that probate proceedings are judicial. Whether they might be sustained as affording due process of law if no notice were given possible claimants is a question unnecessary to consider, since under the authorities (as observed by Mr. Justice Holmes in Tyler *vs.* Judges, 175 Mass., 71, 75),

> "the conclusive effect of the decree is not put upon the ground that the State has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding *in rem*."

> "Probate proceedings being *in rem* it is within the power of the legislature (within reasonable bounds) to say what should constitute sufficient notice to give the court jurisdiction of the estate and what should be sufficient to apprise those interested therein that the court will administer and ultimately distribute the property among the parties in interest. Where the notice is sufficient to accomplish this purpose * * * the courts generally hold, and especially the Supreme Court of the United States, which is the final arbiter upon this subject, expressly holds that such a notice constitutes what is termed 'due process of law.'"

Barrette *vs.* Whitney (Utah), 106 Pac., 522.

Probate proceedings are uniformly treated as proceedings *in rem* and binding as such, because reasonable notice is

given all interested and because the *res* is within the jurisdiction.

Michigan Trust Co. *vs.* Ferry, 175 Fed., 667, 674.
Underground Electric Railways Co. *vs.* Owsley, 176 Fed., 26, 30.
In re McNaughton's Will (Wis.), 118 N. W., 997, 1003.
McKenna *vs.* Garvey, 191 Mass., 96; 77 N. E., 782.
Tracy *vs.* Muir, 151 Cal., 363.
Estate of Davis, 151 Cal., 318, 326.

Pages 96 to 113 continue the discussion of the claim that a proceeding under the California statute being "*ex parte*" cannot render any question of title *res judicata*. It is sufficient answer that the proceeding is not "*ex parte*."

The case of Tregea *vs.* Modesto Irrigation District, 164 U. S., 179, so frequently referred to and quoted at such length in appellant's brief, involved no proceeding to quiet title to land against the claims of unknown persons. It was a proceeding by an irrigation district under the so-called "Wright Act" of California to obtain a decree declaring valid a proposed issue of bonds. No bonds had been issued, no contract made, and it was optional with the district whether it would issue bonds at all. The case was not decided upon the ground that "due process of law" had been denied appellant in the confirmation proceeding, but the appeal was dismissed upon the ground that *no property rights were involved;* that the power claimed by the appellee and sought to be adjudicated by the action was a mere naked power which the board of trustees of the district might exercise or not as they saw fit; that until the bonds were issued no property right of the appellant as a land-owner of the district was invaded, and that "all that would be accomplished" by an affirmance of the judgment—

> "would be an adjudication *of the right to make a contract,* and unless the board should see fit to proceed

> in the exercise of the power thus held to exist, all the time and labor of the court would be spent in determining a mere barren right—a purely moot question."

The case hardly needs to be distinguished from a suit by the owner of land to quiet and establish of record his title against existing adverse claims, known and unknown.

Cushing *vs.* Laird, 107 U. S., 69, is cited throughout the brief for appellant to the point that even in a proceeding *in rem* the rights of unnamed adversaries cannot be adjudicated. If the case had enunciated any such doctrine it would, of course, have overturned the whole theory of proceedings *in rem*. But it does not suggest such a principle. It holds that where a vessel was claimed as a prize by the government an adjudication against the government holding the vessel to be "no prize" did not adjudicate the claimant's title to the vessel as against third persons.

VII. The removability of a proceeding under the act is not a test of its validity.

The test proposed on pages 112 to 123 of appellant's brief for determining whether a proceeding affords "due process of law" by determining whether it could be removed to the Federal courts is novel but fallacious. It has been discussed in our earlier brief (pages 255 to 257). We do not doubt that wherever a "controversy" does arise "between citizens of different States" in a proceeding under the California act the case will be removable to the Federal courts. The joinder of unknown claimants as defendants, like the joinder of defendants sued by fictitious names, will be treated as not affecting the removability of the action.

See Parkinson *vs.* Barr, 105 Fed., 81.

Proceedings under the Burnt Records Act of Illinois (conclusive on the world) have been removed to and entertained

in the Federal courts without question of their jurisdiction and this court in terms decided that they were removable.

Gormley *vs.* Clark, 134 U. S., 338.

See also:

Smith *vs.* Gage, 11 Biss., 217; 12 Fed., 32.

The removability of an action has not the slightest bearing on its validity as affording "due process of law." There are many cases in which the claims of non-residents are involved which do not take the form of removable "controversies between citizens of different States." The test of *removability* is diversity of citizenship, and this is held to mean that all persons on one side of a controversy must have citizenship diverse from that of all opposed to them. The test of *validity* is "due process of law"—reasonable notice and an opportunity to be heard.

VIII. While the remedy provided by the act is valid primarily as a judicial proceeding affording due process of law and resulting in a judgment conclusive on the world, the act is valid regarded merely as establishing a statute of limitations.

On pages 123 to 129 of appellant's brief it is argued that "the act cannot be sustained as analogous to the common-law fine." It is not essential to its validity that the remedy bear any resemblance to the common-law fine. Due process of law has never required that—

> "the procedure of the first half of the seventeenth century * * * be fastened upon the American jurisprudence like a straight jacket only to be unloosed by constitutional amendment."
>
> Twining *vs.* New Jersey, 211 U. S., 78, 101.

This portion of appellant's brief purports to be in answer to a supposed statement by the California Supreme Court in

the Title Document Case, 150 Cal., 289, that the act under review is "in a way * * * analogous to the common-law fine."

The California court made no such statement. Referring to a remedy *suggested by counsel for respondent* (counsel for appellant here) as the only means by which the rights of unknown owners could be concluded—a decree which "does not operate *ex proprio vigore*, but becomes the starting point of a statutory period of limitation"—the court observed that *"the procedure thus outlined"* was "in a way * * * analogous to the common-law fine." This was said merely as a basis for the further observation that (p. 313)—

> "because such method of accomplishing the result may have been the only one known to the common law, it does not follow that other methods may not be devised by the legislature without exceeding the limits of due process of law."

While we believe that the statute does in one aspect provide a remedy in principle "analogous to the common-law fine," this portion of appellant's brief obviously assumes to answer a suggestion of the California court which that court did not make. The argument under this head, and that under the next subdivision of appellant's brief, to the point "that the act cannot be sustained as a statute of limitations" (pages 130 to 137) can best be considered together.

(a) As construed by the State Court the act prescribes (apart from a valid judicial proceeding binding all claimants) a period of limitations after entry of the decree, rendering it operative as a reasonable statute of limitations.

There are two modes at least by which a State may settle and quiet title to property within its limits against all persons. One is by a judicial proceeding affording adequate

notice to all claimants, known and unknown; another is by a statute of limitations.

In certain of the Torrens Acts, and under the present act as construed by the California court, there are involved both a judicial proceeding and a statute of limitations. Every person claiming an interest in or lien upon the property described is named as defendant in an action, served with process and afforded an opportunity to be heard. The decree when entered is therefore *ex proprio vigore* from a constitutional point of view, binding and conclusive. But to this the legislature has added a period of limitations within which all not personally served may appear and assert their claims. If a claimant makes no assertion of his rights within that time, he is concluded not only by a decree in itself binding upon him, but as well by the operation of what is in effect a statutory period of limitations.

Section 12 of the act provides that:

> "Except as herein otherwise provided, all the provisions and rules of law relating to evidence, pleading, practice, new trials and appeals applicable to other civil actions shall apply to the actions hereby authorized."

Among the provisions and rules of law thus adopted by express references are those of section 473 of the Code of Civil Procedure of California. That section permits a court to allow amendments to pleadings and as to parties upon such terms as may be proper; to enlarge the time for answer or demurrer; and to relieve a party from a judgment, order, or other proceeding taken against him through mistake, inadvertence, surprise or excusable neglect. It further provides that:

> "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time

within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

In Hoffman *vs.* Superior Court, 151 Cal., 386, 393, this provision was held applicable to proceedings under the act. The court said:

> "In this connection it is proper to say that in determining whether or not due process of law is afforded, other statutes applicable to the proceeding may be considered. *The provisions of section* 473 *of the Code of Civil Procedure apply in such cases. Any person interested in the property and having no actual notice of the decree, may come in at any time within a year after its rendition, and by showing that he has not been personally served with process, and stating facts constituting a good defense to the proceeding—that is, facts sufficient to show that he has a valid adverse interest in the property—he may have the decree vacated as to him, and be allowed to answer to the merits.* Gray *vs.* Lawlor, 151 Cal., 352."

Section 473 in this respect is held mandatory. "May allow" means "must allow."

> "Under this clause the defendant need not present any excuse for his failure to appear except the fact that he was not personally served with summons."
> Gray *vs.* Lawlor, 151 Cal., 352.

> "On complying with the conditions of the statute, the moving party secures *an absolute right* to have the judgment opened, *which the court has no discretion to deny.*"
> *Idem.* (quoting 1 Freeman on Judgments, sec. 105).

A defendant not personally served and offering a valid defense is—

> "entitled *as a matter of absolute right* to have the judgment vacated and set aside, and the court was *without any discretion* in the premises."
>
> Holiness Church *vs.* Metropolitan Church Association (Cal. App.), 107 Pac., 633.

Under the act, therefore, as construed and applied by the courts of the State, anyone served by publication has a full year after the entry of the decree within which to appear and assert his claims. This establishes in effect a period of limitations of reasonable duration, which, if we were to disregard the conclusive effect of the judgment itself, would make the act a valid exercise of legislative power and binding on all claiming any interest in land affected by its provisions.

The Illinois Burnt Records Act (see Compilation of Burnt Record and Land Title Acts heretofore filed) provided a proceeding in principle the same as that under review, but omitting many of its safeguards. Actual possession of the land by the plaintiff was not required. The records having been destroyed, he filed a petition alleging that fact, describing the land, stating his interest in it and the derivation of his title. He named as defendant those who were in possession and who were grantees in deeds recorded *since* the destruction of the records.

> "All other persons shall be deemed and taken as defendants by the name or designation of 'all whom it may concern.'"

The defendants sued by name were personally served. Against all others process was published once a week for four weeks. The decree "when entered shall be forever binding and conclusive." The only exceptions related to persons under disability, and those who, being in possession of the land or appearing as grantees under deeds recorded since the destruction of the records, had, in violation of the

act, not been named and personally served. As to all others it was provided merely:

> "That all defendants who shall not be actually served with a summons in the suit in which such decree may be rendered, shall have allowed to them one year after the entry of such decree within which, upon petition to the court rendering the same, to have the said decree vacated and set aside in the same manner as is now allowed to defendants under section 19 of chapter 22 of the Revised Statutes entitled 'Chancery.'"

The section of the Revised Statutes referred to (quoted 135 Ill., page 116) provides that if a defendant served only by publication shall within a specified time—

> "appear in open court and petition to be heard touching the matter of such decree and shall pay such costs as the court shall deem reasonable in that behalf, that the person so petitioning may appear and answer."

The Illinois act was repeatedly sustained as constitutional, and upon the ground deemed amply sufficient that—

> "*the statute was in effect a statute of limitations,* and under the circumstances was not unreasonable, but demanded as a matter of safety in a great emergency."
> Gormley *vs.* Clark, 134 U. S., 338 (reviewing the Illinois cases).

The Massachusetts Torrens Act made no provision, either in itself or by reference to the general law, by which one not personally served might appear and answer after entry of the decree. It was nevertheless sustained by the majority of the court as providing a judicial proceeding constitutionally sufficient to bind all claimants, known and unknown. This view was opposed by Judge Loring, but it was conceded even by him that:

> *"It would be within the constitutional power of the legislature to enact that the effect of some such decree as is provided for in this act, when properly proclaimed and served, should have the effect to put the claimant in possession of the title so set up, and that if that possession continued unbroken and the decree setting up the applicant's title remained in force unmodified for a specified time, all the world should be barred.* * * * Such a requirement would practically enable any person to protect his rights of property by an examination of the records of the Court of Registration made during the specified term."

Mr. Justice Holmes, in the majority opinion, said:

> "Prescription or a statute of limitations may give a title good against the world and destroy all manner of outstanding claims without any notice or judicial proceedings at all. Time, and the chance which it gives the owner to find out that he is in danger of losing rights are due process of law in that case. Wheeler *vs.* Jackson, 137 U. S., 245, 258. The same result used to follow upon proceedings which looked at apart from history, may be regarded as standing half way between statutes of limitations and true judgments *in rem*, and which took much less trouble about giving notice than the statute before us. We refer to the effect of a judgment on a writ of right after the mise joined and the lapse of a year and a day (citing authorities); and of a fine with proclamation after the same time, or by a later statute, after five years (citing authorities)."
>
> Tyler *vs.* Judges, 175 Mass., 71; 55 N. E., 812.

In State *vs.* Westfall, 85 Minn., 437; 89 N. W., 175, the Torrens Act there under review allowed but *sixty days* within which the decree could be vacated and an answer filed by one not personally served. It further provided that after that time no proceeding should be had for the recovery of the land. This latter provision was held inapplicable to one in actual possession of the land who in violation of the act had

not been personally served, and who plainly had no right of action for possession.

> "So construed the provision of the act, both as to the opening of the decree and as to the commencement of any action or proceeding to recover the land in opposition to the decree *is valid as a statute of limitations.* The time limit seems to us a short time, but in view of the complete and far-reaching provisions of the act for notice to all parties, and the fact that the right of appeal as in civil actions is given, we cannot hold that the legislature arbitrarily exercised its discretion in fixing the limit."

In the excellent brief already referred to which forms a part of the report of the New York Commission on the Torrens system for the registration of titles, after a careful review of the authorities, it is said (page 61):

> "Such authorities are sufficient to show that reasonable notice by publication as prescribed by the legislature is sufficient in proceedings to fix the title to real property within the jurisdiction of the court. If now we add a statute of limitations to be started running by the judgment or decree in such an action and to run for a reasonably short time, say a year or six months, against those who were not personally served with process of the court, but were duly served by publication, the conclusion seems to be clear, that the running of such a statute effectually shuts out all their claims in the property."

Again (page 67):

> "As already shown there is practical uniformity of opinion and decision that if a reasonable period is given to everybody interested and properly served with process to come into court and move to open and retry the question of registration of title after it has once been duly registered and the registration is made to start such a reasonable statute of limitations, then everybody, including unknown and unascertainable persons properly served with process, become bound

> and precluded by the expiration of such period. * * * This is admitted even by Judge Loring in his dissenting opinion in the case of Tyler *v.* Judges, 175 Mass., 71. * * * So long as the time fixed for the running of such a statute is reasonable, the statute is constitutional."

(*b*) *The reasons assigned in the brief for appellant why the act cannot operate as a statute of limitations are without force.*

This brings us to a consideration of appellant's reasons why the act "cannot be sustained as a statute of limitations."

The first of these is that, despite the express holding of the California court to the contrary, section 473 of the Code of Civil Procedure does not apply in a proceeding under the act. It is said that the decision of this question in Hoffman *vs.* Superior Court, 151 Cal., 386, 393, was *obiter dictum*, and this court is asked to reverse the ruling of the California court for the purpose of giving to the statute a construction which (appellant argues) would render it invalid.

To this contention there are many answers. In the first place, the Supreme Court of California has construed the statute, and this court will abide by that construction in determining whether it affords due process of law. Nor was the decision of the point in Hoffman *vs.* Superior Court an *"obiter dictum."* The question had been fully argued in the Title Document case, 150 Cal., 289. The court in that case said (p. 326):

> "It is not necessary to decide at this time whether parties not personally served may come in and defend within one year after judgment, as provided in section 473 of the Code of Civil Procedure. Whether that section applies to proceedings under this act is a question of construction which can best be considered when it arises in a case directly involving the point. We doubt that the interpretation excluding the right to come in would invalidate the

act. *If it should be considered to have such effect, that would be sufficient ground for construing the act so as to allow the application of section* 473 *of the Code of Civil Procedure—a construction that is certainly possible under section* 12 *of the statute.*"

In Hoffman *vs.* Superior Court (151 Cal., 386), the counsel who there appeared for respondent (and for appellant here) again attacked the act as not affording due process of law. In reaffirming its former conclusion upon this point the court said:

> "In this connection it is proper to say that *in determining whether or not due process of law is afforded,* other statutes applicable to the proceeding may be considered. *The provisions of section* 473 *of the Code of Civil Procedure apply in such cases.* Any person interested in the property and having no actual notice of the decree, may come in at any time within a year after its rendition and by showing that he has not been personally served with process and stating facts constituting a good defense to the proceeding—that is, facts sufficient to show that he has a valid adverse interest in the property—he may have the decree vacated as to him and be allowed to answer to the merits."

The Hoffman case was a proceeding for mandamus to compel pronouncement of judgment in a case under the act. One of the grounds of defense urged by respondent was that repeatedly urged before and since—that the act does not afford "due process of law." Regarding the applicability of section 473 as material to this question the court construed the statute in the particular under discussion, and in so doing gave its opinion upon a matter properly involved in the case before it.

Apart from any holdings of the California court on the subject, there can be no doubt that the provisions of section 473 do apply to the remedy established by the act.

Among all of the sections of the Code of Civil Procedure none plays a larger part in California practice. In section 473 the courts find their authority to allow amendments to pleadings, to enlarge the time for pleading, to permit the joinder and striking out of names of parties, to relieve litigants from judgments, orders, or other proceedings taken against them through mistake, inadvertence, surprise or excusable neglect, and (under the clause here involved) to allow to parties not personally served with process the right to appear after judgment and answer to the merits of the action.

If section 473 were not applicable to proceedings under the act, these would be stripped of most of the provisions through which the Code subordinates formalities of pleading and procedure to the larger purpose of requiring a determination of litigation on its merits.

In appellant's brief the holding that section 473 is applicable to such proceedings is treated as "an unwarranted imputation upon the legislature" and as "absurd." The argument made to justify this rather forcible language is, that under section 8 of the act any person claiming an interest in or lien upon the land may appear within three months after the first publication of summons or within such further time, "not exceeding thirty days," as the court may grant, and "make himself a party to the action by pleading to the complaint."

So far as the contention hangs upon the phrase "make himself a party to the action by pleading to the complaint," it is a play on words and may be passed with what is said concerning it at page 222 of our main brief. So far as it depends upon a claim that section 8 (permitting the court to extend for only thirty days the time for appearance before judgment) is inconsistent with section 473, permitting certain defendants a year after judgment within which to appear, it may be easily disposed of. The same provision—that the time for a party to plead before judgment cannot

be extended by the court for more than thirty days—is found in the general law relating to all civil actions, which, while allowing a judge to extend the time of pleading, etc., provides that "such extension shall not exceed thirty days without the consent of the adverse party" (C. C. P. Cal., sec. 1054). We confess ourselves unable to discover any inconsistency between a provision limiting the time within which a party may appear before judgment and a provision specifying the time within which, if not personally served, he may appear after judgment.

That the act makes the judgment "binding and conclusive" is no more inconsistent with the applicability of section 473 than with a right of appeal or a motion for new trial. The act settles the applicability of these latter proceedings by adopting them in express terms.

We do not believe that any construction of the act in relation to the point under discussion would affect its constitutionality (the decree *ex proprio vigore* is binding on the world). But if it could, and the applicability of section 473 were an open question, we submit that this court would hardly adopt a construction contrary to that given the act by the State court, and urged for the very purpose of rendering it (in the case supposed) invalid. We need not burden this brief with authorities to the point that of two possible constructions that will always be adopted which will make an enactment valid and not invalid.

> Grenada County Supervisors *vs.* Brown, 112 U. S., 261, 269.

It is suggested, rather than argued, in appellant's brief that no statute of limitations could bar appellant's rights, since it claimed only a reversionary interest which would not take effect in possession until 1950.

Before replying to this it is proper to note to what result (in view of the other propositions urged) such a contention leads. If it and the other positions taken by appellant

were tenable, a State would be powerless by any remedy to settle and quiet the title to land within it. It is true that counsel strenuously deny that their argument leads to such a conclusion. The court is told (page 10) that "it is absurd to assume" that they urge such a view. At the end of the brief (page 201) counsel undertake to show how, "if it is "desired to bind third or unnamed or unknown persons, "this may be readily and justly accomplished."

After all of the denunciation of the act by counsel it is remarkable that the remedy proposed by them should differ so slightly in detail, and not at all in principle, from that established by the legislature of California. The procedure outlined is a judicial proceeding, with possession thereafter under the decree for a reasonable time. But counsel do not admit that this will definitely settle or quiet title. After the judicial proceeding has passed to judgment, and after the proposed period of limitations has run its course, they are careful to say merely that—

> "the rights of all *who are entitled to sue for possession* may be barred."

In other words, to put the matter briefly, it is beyond the power of the State of California to devise a proceeding which shall clear and quiet the titles to land within it. Any person who, unknown to the owner and possessor of land, claims a *future* interest in that land is beyond the reach of the State. It cannot affect him by a judicial proceeding, we are told; for the moment such a proceeding takes the form of an action against possible claimants whose claims are unknown, it lacks the element of "controversy," ceases to be "judicial," becomes "*ex parte*," and, as to such persons, void. Nor can it be done by a statute of limitations. For though such a remedy is frequently suggested in the brief (see pages 95 and 201) it is claimed in the end that it cannot affect any who do not claim a present right to possession.

We submit, in the language of Arndt *vs.* Griggs, that "no

such imperfections attend the sovereignty of the State" (134 U. S., 316).

If any statute of limitations or if any adverse possession can be made effective by a State to bind all claims and all character of interests in land, the statute here involved is certainly sufficient.

The plaintiff must be in actual possession of the land before he can maintain the action. If possession can ever become adverse to an unknown claimant, it must become so when the party in possession, proceeding under statutory provisions for the settlement of titles, places upon official records and maps notice of the hostility of his possession, posts notice to the same effect upon the land affected, and publishes such notice in a newspaper of general circulation in the county for two months.

It is true that, as a general rule, a tenant's possession is subordinate and not adverse to that of the party under whom he entered. But it will become adverse upon a disclaimer of the landlord's title brought home to the latter either actually or constructively. Such notice need not be either formal or actual.

> "It is sufficient if knowledge thereof may be imputed impliedly by collateral facts of such a nature as to cast on the landlord the legal duty of not being willfully or negligently ignorant of all proper inferences to be drawn from such facts and an adverse holding, as a matter of fact, may be found from a long-continued possession without payment of rent or recognition of the landlord's title."
>
> 2 Enc. Law & Prac., 471.

So it is a general rule that possession by the owner of an intermediate estate (as, for example, an estate for life) is not adverse to the remainderman or the reversioner, since the latter is not entitled to possession and has no right of action therefor until the termination of the particular estate.

But even here if the owner of the future estate is given a

right of action by statute (as, for instance, to quiet title), his failure to pursue it within the statutory time after his rights are questioned and assailed, will bar such rights.

Murray *vs.* Quigley, 119 Iowa, 6; 92 N. W., 869; 97 Am. St. Rep., 276.

Crawford *vs.* Meis, 123 Iowa, 610; 99 N. W., 186; 66 L. R. A., 154; 101 Am. St. Rep., 337.

Under a statute so providing, adverse possession operating against a tenant in tail, unless arrested by him, will bar both the tenant in tail and the estate in remainder.

Bassett *vs.* Hawk, 118 Pa. St., 94; 11 Atl., 802.

Under a statute which provides that possession accompanied by a *bona fide* claim under color of title for seven years, together with payment of taxes, shall vest title by adverse possession, title in fee can be acquired during the continuance of the life estate even as against a remainderman or a reversioner, the claim of the latter being unknown to the party in possession.

Lewis *vs.* Barnhart, 145 U. S., 56.

Dugan *vs.* Follett, 100 Ill., 581, 589.

In the case at bar it is not contended or alleged that appellee had any notice, actual or constructive, of the claim of appellant or its predecessors in interest. We quote from the brief for appellant (page 7):

> "It is possible *that appellee here proceeded in the State court in the belief that he was asserting a right actually vested in him.*"

The general rule that a reversioner or remainderman cannot be barred during the continuance of the particular estate rests upon the fact that ordinarily until its determination no right of action has accrued to him. Where, as under the statute referred to in the Iowa cases above cited, he is given

a right of action to quiet title whenever his rights are assailed, or where, as under the law of Illinois, the running of the period of limitation can be prevented by any claimant of a future estate by notice, actual or constructive, of his claim to the party in possession, there is no injustice or hardship, but, on the contrary, sound public policy in requiring "a prompt settlement of such questions of title while yet the facts are within reach of the parties interested." Where the public interests demand, the law may require even a party in actual possession of land and claiming a perfect title to appear before a properly constituted tribunal and establish that title by a judicial proceeding. Such was the method employed by the United States in settling as between itself and claimants under Mexican grants the title to property in California. The law was held to apply, although the title of the claimant was perfect before the transfer of sovereignty.

Barker *vs.* Harvey, 181 U. S., 481.
Mitchell *vs.* Furman, 180 U. S., 402.
Botiller *vs.* Dominguez, 130 U. S., 238.
More *vs.* Steinbach, 127 U. S., 70.

In Botiller *vs.* Dominguez, 130 U. S., 238, Mr. Justice Miller, after observing that the United States might have sued all who were in possession of land in California and compelled them to produce their title, said:

> "Such suits would have been sustained without hesitation as being legal, constitutional and according to right. What difference can it make then that the party who is supposed to possess all the evidences which exist to support his claim, is called upon to come before a similar tribunal and establish it by a judicial proceeding. It is beyond question that the latter mode is the more appropriate one to carry out the object intended.
>
> "We are of opinion that these acts applied and were intended to apply to all claims whether perfect or imperfect; * * * that the courts were bound

> to accept their provisions and that there was no want of constitutional power in prescribing reasonable limitations operating to bar claims if the course pointed out were not pursued."
>
> Mitchell *vs.* Furman, 180 U. S., 402, 438.

One who claims a future estate "possesses" nothing but a claim or (if his claim is valid) a right. He cannot be physically "dispossessed" of it. But his "possession" can be so challenged as to start running a period of limitation against him. That is done whenever his right is challenged by action or by notice of an adverse claim. This is what was meant by Judge Loring in Tyler *vs.* Judges (175 Mass., 71):

> "It would be within the constitutional power of the legislature to enact that the effect of some such decree as is provided for in this act, when properly proclaimed and served *should have the effect to put the claimant in possession of the title so set up*, and that if that possession continued unbroken, and the decree setting up the applicant's title remained in force, unmodified, for a specified time, all the world should be barred."

See also in this connection:

> People *vs.* Turner, 145 N. Y., 451; 40 N. E., 400, affirmed by this court in—
>
> Turner *vs.* New York, 168 U. S., 90.

It is finally said in the brief for appellant that the act could not operate against it as a statute of limitations, because if it had appeared within a year after the entry of the decree the court might, under the terms of section 473, have imposed "such terms as may be just." Upon this point Roller *vs.* Holly, 176 U. S., 398, is cited. In that case a notice of five days to a non-resident was held too short to be reasonable. It was suggested that the defendant might have asked relief from the judgment. In answer to this the court said:

> "Very probably too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but *that would be a matter of discretion*, a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis *more substantial than favor or discretion.*"

In California and under section 473 *the right of a party not personally served to appear and defend is not a matter of "favor and discretion." It is an "absolute right."*

Under that section one within its terms is

> "entitled *as a matter of absolute right* to have the judgment vacated and set aside, and the court is (was) *without any discretion* in the premises."
> Holiness Church *vs.* Metropolitan Church Association (Cal. App.), 107 Pac., 633.

In Gray *vs.* Lawlor, 151 Cal., 352, it was held that the only showing required of an applicant is proof that he had not been personally served and has a defense to the action. The language of Freeman on Judgments is quoted with approval:

> "On complying with the conditions of the statute the moving party secures an *absolute right* to have the judgment opened, *which the court has no discretion to deny.*"

The construction given by the Minnesota courts to a similar statute is adopted in the California case.

> "It provides to the defendant who comes within its terms and who shows that he has a good defense, and who has not lost his right by laches, an opportunity to defend *as a matter of right and not of discretion.*"

The phrase allowing a court to impose "such terms as may

be just," it is held, *adds nothing to the statute.* In the case cited (Gray *vs.* Lawlor) it was said:

> "In all the States except Minnesota, the statutes differ from ours in that they omit the phrase 'on such terms as may be just.' *This does not change the effect of those statutes in the particular here under consideration. The effect of that qualifying phrase in our statute is not to give the court power or discretion to refuse the relief when the statutory conditions expressed and implied are met.*"

The court then instances terms which in certain cases and under particular circumstances might be necessary to do "complete justice between the parties." It was dealing with a case in which a party *already bound by a judgment* applies for a vacation of the decree. His right to this relief it held "an absolute right" under the statute. The court vacating the decree might fix the time for filing the answer, define its nature so that it will be addressed to the merits, or, under certain circumstances, require a reimbursement of the plaintiff for expenses incurred in reliance upon a valid judgment, "which the defendant in justice should refund." This is a case in which, as we have said, the applicant was already concluded by a judgment. In such a case the imposition of proper terms as a condition to vacating the judgment can obviously violate no right, constitutional or other. But if appellant were correct and a decree under the act could not in and of itself bind an unknown claimant, only such provisions of section 473 as are applicable to such a case could be applied. If, therefore (as we are now assuming for the sake of argument and in considering the act under review as a mere statute of limitations), the decree sought to be vacated does not of its own force conclude a party, it is plain that under section 473 (meaning no more with the phrase than it would without it) no terms could be imposed as "just" which would affect the "absolute right" to appear. Where one act is adopted by reference to another.

> "only such portion is in force as relates to the particular subject of the adopting act and as is applicable and appropriate thereto."
>
> 2 Lewis' Sutherland on Statutory Construction, sec. 405.
>
> Jones *vs.* Dexter, 8 Fla., 276, 282-3.

The proceeding with section 473 as part of the act is exactly that described by Judge Loring in Tyler *vs.* Judges and conceded by him to be valid. The decree has

> "the effect to put the claimant in possession of the title so set up, and if that possession continued unbroken and if the decree setting up the applicant's title remained in force unmodified for a specified time all the world should be barred."

The general law which was adopted by reference in the Burnt Record act of Illinois required (see *supra*) that one applying for the vacation of a decree "pay such costs as the court shall deem reasonable in that behalf." It was never claimed that this prevented the act from operating as a statute of limitations, and that it did so operate was held in many cases. (See Gormley *vs.* Clark, 134 U. S., 338, and Illinois cases cited.)

These considerations sufficiently answer the contention. But we submit that the point just discussed is altogether irrelevant to the question whether *appellant*, under the facts alleged in its bill of complaint, has been denied "due process of law." It never applied for the vacation of the decree in Zeiss *vs.* All Persons, etc.; no terms "just" or otherwise were imposed upon *its* right to assert any defense within a year after judgment. On the contrary, its bill of complaint alleges that *it had no knowledge of the decree until more than a year after its entry.*

In Louisville, etc., R. Co. *vs.* Schmidt, 177 U. S., 230, a judgment had been rendered against plaintiff in error, although it was not a party to the action prior to the judgment. It was thereafter brought in by an order to show

cause, and decreed to pay the judgment. This court held that the procedure gave both notice and a hearing and was due process of law. It was claimed by the corporation that while it had been given notice (although after judgment) it had been denied an opportunity to defend, since the State court had upheld its power to proceed by rule on the ground that the plaintiff in error was already bound by the judgment entered, and "therefore the rule rested upon an assumption which precluded the setting up of any defense to it."

> "But the answer to this argument is plain. * * * The argument * * * asks us to say that the Louisville and Nashville in the proceeding in which it was duly served and to which it responded and as to which it had its day in court, *was deprived of defenses which it never asserted* and that due process of law was not administered to it *because it was unheard in respect to matters concerning which it made no claim. But this court cannot be called upon to conjecture that defenses existed which were not made and to decide that proceedings in a State court have denied due process of law because defenses were denied when they were not presented.*"

If the Louisville and Nashville had not appeared *at all*, would it have had greater right to complain that it had been deprived of a defense which it never urged, and that it was therefore denied due process of law?

The case cited is but an application (although an apt one) of a principle settled and elementary in this court, that one who has not in fact been injured by a provision cannot claim to have been denied due process of law by reason of it.

Citizens National Bank *vs.* Kentucky, decided May 2, 1910 (Advance Sheets Lawyers' Edition, June 1, 1910, page 532), and cases cited.

Tyler *vs.* Judges, 179 U. S., 405.

In the case last cited it was held that one sued under the Massachusetts Torrens Act as an unknown claimant, but having actual notice of the proceedings, could not complain that the act deprived *him* of due process of law merely because it permitted unknown claimants to be served by publication. The facts here are reversed, but the principle is equally applicable. Appellant here alleges it *knew nothing* of the decree for more than a year after its entry, but claims to have been denied due process of law by a phrase of a statute applicable only to defendants appearing within a year, and which, at most, permits a court to impose "just" terms ("just" terms in those cases where terms may justly be imposed) on those who do appear.

We submit, in conclusion, upon the point under discussion, that although a decree under the act, considered merely as a judgment rendered after reasonable notice and opportunity for hearing, is, from a constitutional view, valid and conclusive of the rights of all persons, known and unknown, the statute is constitutional and the rights of appellant are concluded by a proceeding under it, if, like the Burnt Record Act of Illinois, it were to be regarded merely

> "in effect a statute of limitations and under the circumstances not unreasonable but demanded as a matter of safety in a great emergency."
>
> Gormley *vs.* Clark, 134 U. S., 338.

IX. The remedy provided by the act is sustainable as a proceeding strictly in rem; but whether strictly in rem or quasi in rem, it provides every possible means of notice and a hearing, and therefore affords due process of law.

On pages 137 to 172 of the brief for appellant it is urged that "the proceeding provided for by the act is not an action *in rem* in the sense that it may constitutionally conclude the rights of third parties." We may assume that the

phrase "third parties" means persons joined as unknown claimants.

Many of the propositions argued under this heading have but remote relevance to the case at bar or to the statute here involved. The question before this court is whether the proceeding provided by the act affords due process of law to an unknown claimant of an interest in land affected by it. This depends upon whether it gives reasonable notice to such claimants and allows them an opportunity to be heard. If it does it affords due process of law; if not it matters but little whether it be called a proceeding *in rem* or one *quasi in rem*. The class to which it belongs depends very largely upon the meaning we chose to attach to the phrase "action *in rem*."

> "It is certain that no phrase has been more misused."
>
> Holmes, J., in Tyler *vs.* Judges, 175 Mass., 71.

In one sense an action is *in rem* whenever the jurisdiction of the court depends upon its control of the *res*, and its adjudication concerns only rights in that *res*. In form such actions may be *inter partes*. Instances are statutory suits to quiet title where the judgment operates directly upon the property (Arndt *vs.* Griggs, 134 U. S., 316). In an even broader sense an action to recover a purely personal judgment is often termed "*in rem*," because the court's jurisdiction and the enforcement of its decree depend upon a preliminary seizure of property belonging to the defendant. The type of this class is the ordinary action against a nonresident, initiated by attachment of property within the State. In still another sense an action is said to be *in rem* whenever it is intended to bind all the world. This is the true sense of the phrase according to the opinion of Mr. Justice Holmes in Tyler *vs.* Judges, 175 Mass., 71.

In a no more accurate sense the phrase "action *in rem*" is sometimes used to designate an action which is in form against a *res*. Here the central feature of the proceeding, because of the form of the action, is made the property itself; the parties are impleaded not by name but through their ownership in or claim to the property involved. The judgment conclusively determines the status of the property, and in consequence the rights of all who claim interests in it. For this reason all the world are said to be parties. Such are admiralty proceedings *in rem*, prize causes, seizures and condemnation under revenue laws, etc.

The brief for appellant recognizes only the class last described as being *"in rem."* It assumes that the proceeding here involved must either be sustained as in strict analogy to an admiralty proceeding against a vessel, or must be invalid.

A reading of this part of appellant's brief would indicate that those who seek to sustain the act as valid argue that the legislature can make any proceeding constitutional regardless of the notice afforded, by merely calling it a proceeding *in rem*. Of course no such position has ever been taken. We have always insisted that the question is one of substance and not of names. Whether the proceeding can be sustained by reason of its analogy to an admiralty proceeding depends upon whether it affords notice as reasonable as that afforded by the admiralty proceeding.

The remedy provided by the statute goes far beyond the notice given in an admiralty action against a vessel, and (as frequently stated) adopts every means of constructive notice known to the law. A consideration of the validity of the judicial proceeding which the act establishes really involves but two questions: First, whether it is within the power of a State to provide a proceeding to settle and quiet title to land against adverse claims, known and unknown; Second, whether the notice afforded by this proceeding is reasonable.

The first question is answered by authorities so numerous that it can no longer be regarded as an open one. If, then, a State has the power invoked by this act, we submit that the proceeding which California has prescribed affords reasonable notice, and, indeed, employs every mode of notice reasonably possible.

There is here no question whether a known resident claimant is afforded due process of law by mere constructive service of process. That he is not was the point decided in State *vs.* Guilbert, 56 Ohio St., 575, and Bear Lake County *vs.* Budge, 9 Idaho, 703, both quoted at page 143 of appellant's brief. In both cases it was expressly conceded to be within the power of the State to bind *unknown* claimants by constructive service of process. The Ohio case has already been considered in this brief, and is discussed at page 150 of our earlier brief. The Idaho case may be found reviewed on page 154 of the latter.

If this statute attempted to bind known resident claimants by merely posting notice on the land it might be of some importance to inquire whether it could be justified by analogy to an admiralty proceeding *in rem*. But the statute provides for personal service wherever it is possible.

We may therefore dismiss from the case the question whether a proceeding under the act could be sustained if it followed exactly the form and gave only the notice of an admiralty proceeding against a vessel. Whether regarded as strictly "*in rem*" or as "*quasi in rem*" it employs every means of notice reasonably possible, and whether this affords due process of law does not depend upon the form of the action. The proceeding could be sustained, if it were necessary, as a proceeding "strictly *in rem*." That question is discussed at length in our earlier brief at pages 39 to 69, and need not be here repeated.

Speaking of the Philippines Torrens act this court has said:

> "The proceeding for registration is likened to bills in equity to quiet title, but it is different in prin-

ciple. *It is a proceeding in rem* under a statute of the type of the Torrens act such as was discussed in Tyler *vs.* Registration Ct. Judges, 175 Mass., 71; 51 L. R. A., 433; 55 N. E., 812."

Carino *vs.* Insular Government, 212 U. S., 449, 456.

In McGehee on Due Process of Law (pages 112 to 118) the author reviews the cases decided by this court to exemplify its "extension of the conception of proceedings *in rem.*" The view of Mr. Justice Holmes in Tyler *vs.* Judges, 175 Mass., 71, that any proceeding is *in rem* the purpose of which is to bind the world, is declared to be "surely sound sense and seems to be warranted by the trend of the modern cases." Referring to Cunnius *vs.* Reading School District, 198 U. S., 458, upholding the power of a State to administer the estates of absentees upon constructive service, it is said:

> "The court does not classify the proceeding as *in rem* or *in personam,* but it proceeds on the broad ground that the property dealt with is subject to the burdens and obligations of property generally in the State, and that a statute authorizing the procedure is within the police powers of the State and necessary for the well being of society."

The decisions of the court are thus summarized (p. 117):

> "In short it would seem that any proceeding is *in rem* for the purpose of jurisdiction, which the political exigencies of the State, that is public policy, require should be effective upon service by publication or constructive service."

In a note (p. 117) the constitutionality of the Massachusetts Torrens Act is discussed.

> "The validity of the act would seem to follow from the Supreme Court cases cited above."

Certain points suggested by counsel for appellant in their discussion of proceedings *in rem* may be briefly considered.

In its analysis of the admiralty proceeding *in rem* the argument assumes throughout that the vessel is not merely a formal but a real defendant, and that the rights of its owners are but incidentally involved. The fallacy of any such view is discussed in our earlier brief at pages 46 to 51. As there pointed out, no stronger refutation of it can be found than in one of the cases cited by appellant, The Parlement Belge, L. R., 5 Pro. Div., 197.

This court had occasion to answer the same suggestion in Taylor *vs.* Carryl, 20 How., 583, 599.

> "But the District Court seems to have considered that a ship was a juridical person, having a *status* in the courts of admiralty. * * * The District Court, in describing the source of its authority, says of the contract of bottomry, that 'it is made with the thing, and not the owner,' and that the contract of the mariners is similar; that the *res* 'represents' in that court, all persons having a right and privilege, while the rights of the owner are treated there as something incorporeal, separable from the *res*, and which might be seized by the sheriff, even though the *res* might be in the admiralty. This representation is not true in matter of fact, nor in point of law. Contracts with mariners for service, and other contracts of that kind, are made on behalf of owners who incur a personal responsibility; and if lenders on bottomry depend upon the vessel for payment, it is because the liability of the owner is waived in the contract itself. 'In all causes of action,' says the judge of the admiralty of Great Britain, 'which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship, where the owners were not themselves personally liable, or where the liability had not been given up.' (The Druid, 1 Wm. Rob., 399.) And the opinion of this court in The Schooner Freeman *vs.* Buckingham, 18 How., 183, was to the same effect."

What we next quote from the same opinion suggests the answer to practically every point made by appellant.

> *"In courts of common law, the forms of action limit a suit to the persons whose legal right has been affected, and those who have impaired or injured it. In chancery, the number of the parties is enlarged, and all are included who are interested in the object of the suit; and as the parties are generally known, they are made parties by name and by special notice.*
>
> *"In admiralty all parties who have an interest in the subject of the suit—the res—may appear, and each may propound independently his interest. The seizure of the res, and the publication of the monition or invitation to appear, is regarded as equivalent to the particular service of process in the courts of law and equity. But the res is in no other sense than this the representative of the whole world."*

In line with the contention just considered is the argument (pages 148 and 149 of brief for appellant) that the admiralty proceeding *in rem* had historical origin in some peculiar view of maritime obligations—that there was no personal liability of the owner, but the vessel itself was treated as tacitly hypothecated by them. The opinion just quoted indicates the fallacy of this. As shown in our earlier brief, the admiralty proceeding *in rem* was originally nothing more than a seizure of property within the jurisdiction to answer a claim against an owner who could not be personally served. No distinction was recognized between property subject to specific liens and other property of the debtor. The seizure was made for the purpose of compelling appearance by the owners.

> Mears, Admiralty Jurisdiction (quoted at pages 164 and 165 of our earlier brief).

In The Dictator L. R. (1892) Pro. Div., 304, 311, Jeune, J., traces at length the origin and development of admiralty proceedings *in rem*.

> "It would seem clear that the arrest in such cases was not limited to any particular property of the defendant on the seas, that the object of the arrest was to secure appearance and bail, or provide a fund for

> securing compliance with the judgment; and that whatever was the value of the property or the amount of the bail, the defendant would be liable to pay and liable to be attached if he did not pay the full amount of the sum decreed against him."

The conflict between the common law and admiralty courts developed in the latter a proceeding which began by arrest of the property rather than of the person:

> "The result was that arrest became the distinctive feature of the action *in rem*, such arrest having primarily for its object the satisfaction of the creditor, out of the property seized, but there seems no reason to suppose that the action beginning by arrest of the *res* altered the cause or character it had hitherto assumed as to the appearance of the debtor in it; and if that be so, it would seem clear that the full amount of a judgment, if a defendant, who might himself have been arrested, appeared, could be enforced by the means available in the Admiralty Court, monition and attachment, whatever the value of the property arrested was."

Counsel for appellant argue that the only fact which saves an admiralty proceeding from entire invalidity is the fact that the vessel is in charge of a master deemed to represent the owners. A master frequently represents only part of the owners of the vessel, themselves operating it in opposition to other co-owners. But, as was held in Windsor *vs.* McVeigh, 93 U. S., 274 (quoted at pages 166 and 167 of our earlier brief) the mere seizure of the vessel does not in any case give a court of admiralty jurisdiction to proceed. It acquires that jurisdiction only by notice to the world through "monition, public proclamation or publication in some other form."

The presumptive control of property by its owners is not limited to vessels. The law is entitled to and does assume all property to be so far within the control of its owners that they will be apprised of proceedings against it, initiated either

by seizure of it or what is equivalent in the case of land. As said in Ballard *vs.* Hunter, 204 U. S., 262:

> "The law cannot give personal notice of its provisions or proceedings to every one. It charges every one with knowledge of its provisions; of its proceedings it must at times adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings, indeed must frame them, and assume the care of property to be universal if it would give efficiency to many of its exercises."

To fortify the argument that a presumed representation by the master alone renders an admiralty proceeding conformable to justice, appellant's brief states that for this reason no master of a vessel is ever permitted himself to sue *in rem*. As a matter of fact the English law today confers upon the master a right to proceed *in rem*.

The Tagus L. R. (1903), Pro. Div., 44.
1 Ency. Law & Practice, p. 1270, notes 23 and 24.
1 Halsbury's Laws of England, 68, 69.

In urging that an action *in rem* can never be applied to a proceeding having for its object the determination of title, counsel for appellant, say (page 152):

> "Petitory suits in the admiralty involving the title to ships are never considered to be *in rem*."

To this point Benedict, Admiralty, page 384, is cited. That authority makes no such statement, and apparently the reference is merely to admiralty rule 20 of the Federal courts, which is far from declaring any such doctrine. An examination of the authorities will show that nearly all re-

ported petitory and possessory suits have taken the form of proceedings *in rem*.

See

1 Ency. Law & Practice, 1272, 1273, and numerous cases cited.

Benedict's Admiralty (4th ed.), sec. 186, and cases cited.

1 Cyc., 839, *et seq.*, and cases cited.

In England the jurisdiction of admiralty over petitory and possessory suits—those of "co-ownership and restraint"—involving "all questions arising between co-owners as to the ownership, possession, and earnings of the ship * * * *may be exercised in rem or in personam.*"

1 Halsbury's Laws of England, page 64.

If a petitory or possessory suit in admiralty may be in form an action *in rem*, what constitutional objection can there be to a legislative enactment creating a suit to establish and quiet title in the same form? The only objection possible from a constitutional point of view must rest upon a lack of reasonable notice, and this is a question to be determined by the provisions of the act as to notice, rather than by any consideration of the technical form of its procedure.

The numerous contentions in the brief for appellant as to the nature and distinguishing characteristics of admiralty proceedings, and the argument that these are of such character as to prevent a similar form of action being established to quiet title to land, are fully discussed at pages 39 to 69 and 164 to 170 of our earlier brief.

As we have pointed out, the sufficiency of a proceeding against unknown claimants depends upon the same question whether it be classed as *in rem* or as *quasi in rem*. It matters not whether they are said to be made parties because the proceeding is one strictly *in rem*, to which all the world are parties, or whether they are said to be made parties by

general designation in an action *quasi in rem*. The only question in either case is whether the notice afforded them is reasonable.

Ordinarily an action *quasi in rem* joins only known parties sued by name. This is so because ordinarily it is necessary only to reach known defendants. There is, however, a large class of proceedings *quasi in rem* in which by statutory authority there may be a joinder of parties defendant described by general designation. Such are suits against unknown heirs and particular classes of unknown owners. There are still other cases in which the parties defendant include all persons claiming any interest in the *res*, those known being named and personally served, and all who are unknown being reached in the only manner possible—by general designation and constructive service. To this latter class belong statutes like the Torrens acts and suits to quiet title, for partition or in foreclosure, etc., against unknown owners.

On page 164 *et seq.* of appellant's brief it is urged that any judicial proceeding by which a party in possession can by constructive notice conclude the rights of those claiming future interests is against natural justice. We are asked whether appellant was required every week until the year 1950 to go upon the land to see whether its "tenant was violating his trust.

The act was limited to three years of duration, so that 1950 is a false quantity. The catastrophe which gave birth to the act had destroyed all records, and—

> "naturally commanded the attention of all reasonable persons everywhere, and called upon them to attend and see what means would be adopted to mitigate the evils and dangers incident to the destruction."
>
> Bertrand *vs.* Taylor, 87 Ill., 235.

But the appellant need not go upon the land at all. As suggested by Judge Loring in Tyler *vs.* Judges, 175 Mass., 71, 93, speaking of a proceeding which would permit any

one not personally served to appear and answer within a limited time after decree:

> "Such a requirement would practically enable any person to protect his rights of property by an examination of the records of the Court of Registration made during the specified term."

Nor need appellant even examine the records. All that was necessary was that it do not permit its claim to remain unknown to the party in possession of the land, who himself claimed it *bona fide* as owner in fee. No person, whether reversioner or a claimant in fee, could be concluded by any proceeding under the act unless he had so far effaced himself and his claim as to make it both necessary and possible for the party in possession to sue him as an "unknown" claimant.

Of the two things which the "ownership of property implies," the first, it has been said by this court, is "*attention to it.*"

Underwood *vs.* Dugan, 139 U. S., 380, 384.

> "Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*."
>
> *In re* Broderick's Will, 21 Wall., 519.

> "Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises."
>
> Ballard *vs.* Hunter, 204 U. S., 241.

When we are told in the brief for appellant that it was

> "entitled to assume that he (appellee) would not be guilty of so monstrous a breach of trust as he is convicted of by the present case,"

it must be remembered that the breach of trust, if there was any, became possible only through the failure of appellant to disclose its claim that such a "trust" existed. But there was no breach of trust, "monstrous" or otherwise. To again quote from the brief of appellant:

> "The bill of complaint alleges no fraud against the respondent. The complainant had no evidence of fraud, and it is possible that the appellee here proceeded in the State court in the belief that he was asserting a right actually vested in him" (page 7).

In conclusion upon this point it can only be said that a State must for its own security, and especially where confronted by conditions such as those which prompted this act, provide for the definite settlement of title to land. Unknown claims are no more sacred than known claims, but far more dangerous. One whose claims are unknown and permitted by him to remain so, cannot be personally served, and if the State authorize a proceeding affecting such land and "if he fails to receive notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences."

Huling *vs.* Kaw Valley, etc., Co., 130 U. S., 559.

Since March, 1907, provision has been made by the legislature of California by which any person claiming an interest in land can insure personal notice in any proceeding under the statute by merely recording a statement of his claim. This statute is referred to and quoted on page 38 of our main brief.

We shall not attempt a review of the various cases cited under this heading of appellant's brief. Practically all, in

one connection or another, have been discussed in our earlier brief.

State *vs.* Guilbert, 56 Ohio St., 575, and Bear Lake County *vs.* Budge, 9 Idaho, 703, quoted at page 143 of appellant's brief, are reviewed in our earlier brief at pages 150 and 154.

Cushing *vs.* Laird, 107 U. S., 69 (cited at page 151 of brief for appellant), is considered at page 248 of our earlier brief.

Webster *vs.* Reid, 11 How., 460 (page 167, brief for appellant), is reviewed at page 148 of our brief already on file.

In Hollingsworth *vs.* Barbour, 4 Pet., 466 (cited at page 168 of brief for appellant), as pointed out in Shepherd *vs.* Ware, 46 Minn., 144; 48 N. W., 773, "there was no statute authorizing constructive service by publication, and the decision rests upon that ground."

Hill *vs.* Henry, 66 N. J. Eq., 150; 57 Atl., 554, cited through appellant's brief, is discussed at pages 147 and 148 of our earlier brief.

Blagge *vs.* Moore, 23 S. W. (Tex.), 470, another case frequently cited in appellant's brief, was, as pointed out in our earlier brief (page 248) overruled and its holding expressly disapproved in Moore *vs.* Blagge, 91 Tex., 151; 38 S. W., 979.

It cannot be too strongly impressed upon the court that the sole question in this case is really the question whether a State has power to settle and quiet title to land within its borders by a judicial proceeding, and upon adequate notice. That a State has such power cannot be doubted, and the decisions of this court do not leave it doubtful. If that be so, the act here involved is valid, for in any proceeding under it all possible claimants to the property are joined as defendants, and notice is given them and process served upon them in every manner which our law has de-

vised. As said of the Massachusetts statute considered in Tyler *vs.* Judges, 175 Mass., 71, 73:

> "If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims—indeed certainty against the unknown may be said to be its chief end—and unknown claims cannot be dealt with by personal service upon the claimant."

X. The distinctions suggested in the Brief for Appellant with respect to certain of the numerous cases upholding actions against unknown claimants are without force.

Pages 173 to 200 of appellant's brief are devoted to a "review of certain cases cited in support of the act." It must not be thought that all of the cases in which the right of a State to bind unknown claimants has been discussed and upheld are "reviewed." Many of the most important are unmentioned in their entire brief for appellant.

Shepherd *vs.* Ware, 46 Minn., 174; 48 N. W., 773, a leading case and one repeatedly quoted in our earlier brief, is an example. The cases involving the Torrens Acts of the various States are discussed at other places in the brief, but are not listed in this "review." Other cases involving suits against unknown owners, holding them valid and conclusive, and yet not noticed at any point in the brief for appellant, are:

Walker *vs.* Ogden, 192 Ill., 314.
McClymond *vs.* Noble, 84 Minn., 329; 87 N. W., 838.
Belcher *vs.* Mhoon, 47 Miss., 613.
Cole *vs.* Hall, 2 Hill (N. Y.), 625.
Allen *vs.* Allen, 11 How. Pr., 277.
Moran *vs.* Conoma, 13 N. Y. Supp., 625.
Poole *vs.* Lamon (Tex. Civ. App.), 28 S. W., 363.

Certain of the cases cited by us are classified under four heads.

Of these the first group are "actions against unknown heirs." Two points are made in this connection. One is that a designation such as "unknown heirs of Robert Jones" is definite and gives equal notice with the naming of each person in the class, while a proceeding against "all persons claiming any interest" in land particularly described is (it seems) "indefinite" and no notice at all. We submit that there is no valid constitutional distinction between the two designations. The law has as yet devised no method by which an unknown claimant to particular land can be designated except by describing him as claimant of that land and describing the land itself.

The second attempted distinction is that the statutes permitting proceedings against unknown heirs contemplate only a case in which the *names* of the heirs are unknown. This, even if it were true, would not show why such notice is due process of law when the plaintiff knows such claimants to exist but does not know their names, while it is not due process of law if they are sued under the same designation as possible claimants. They receive the same notice in one case as in the other.

In point of fact nearly all of the statutes authorizing suits against unknown heirs are intended to reach all unknown heirs *if any exist*. (If none exist certainly none have been deprived of property without due process of law.) A fair example is section 111 of the Code of the District of Columbia, quoted at pages 132, 237-8 of our earlier brief, and considered in Johnson *vs.* Thomas, 23 App. D. C., 141, and Gwinn *vs.* Brown, 21 App. D. C., 295, 312.

In Abbott *vs.* Curran, 98 N. Y., 665, in a foreclosure action, unknown owners, "if any," were designated in the summons. It was held that—

> "the summons was sufficient (Code sections 438, 451). It was addressed to unknown owners, who are

described, and the words 'if any' inserted in the summons are not objectionable and do not invalidate a summons otherwise perfect."

See also—

Bergen *vs.* Wyckoff, 84 N. Y., 659.
Wheeler *vs.* Scully, 50 N. Y., 667.

The second class of cases considered are proceedings under the Illinois Burnt Records Act. Here the only point seems to be that although the statute authorized unknown owners to be joined as parties defendant, made the decree conclusive upon them, and was upheld as a statute of limitations its effect was not to bind any except named defendants. The cases cited in our brief dealing with the act sufficiently dispose of any such suggestion.

The court is told by counsel for appellant that "no principle could persist for a single generation if it were not for judicial discrimination." This, we think, should have prevented the citation of cases such as Harms *vs.* Jacobs, 155 Ill., 221; 40 N. E., 488, cited at page 186 of appellant's brief. A named defendant had been dismissed from the action. It was held that he was not concluded as an unknown claimant by a decree thereafter rendered in the same action.

A similar case is Goodkind *vs.* Bartlett, 153 Ill., 410. An action had been brought against a party and his wife, her first name being omitted from the summons. It was held that the decree rendered against her was not sustainable, it not appearing that her Christian name was unknown, and that since she had been sued as a named defendant she was not bound by the decree as an *unknown* claimant.

The third class considered are partition proceedings. Many of the authorities involving partition proceedings against unknown owners mentioned in our earlier brief are not noticed at all.

The only point urged as to such cases is that a judgment rendered in partition merely severs the possession but does

not affect the title or involve property rights. Under practically all modern statutes a partition proceeding directly involves the title, and a judgment in it is conclusive upon this point.

30 Cyc. and cases cited.

In Lawrence *vs.* Hardy (N. C.), 65 S. E., 766, the plaintiff, who had been sued as an "unknown owner" in partition, was held bound by the decree and unable to recover her share from a purchaser at the partition sale. It would seem that "rights of property" were plainly affected by a decree having such efficacy.

The last class discussed in appellant's brief are tax and eminent domain proceedings. These are distinguished as exercises of "prerogative" power. While the power may be prerogative it is (in condemnation proceedings especially) almost universally exercised in judicial proceedings. Reasonable notice is as essential to due process of law in these cases as in any other, although, of course, what is reasonable depends upon the nature of the case. The numerous cases of this class involving suits against unknown owners show that such proceedings are not against "natural justice," and that an action does not cease to be "judicial" (on the ground that there is no "controversy") or become "*ex parte*" merely because it seeks to discover unknown claimants and to bind their interests.

XI. Conclusion.

We submit that the statute here under consideration is valid; that the judgment rendered by the Superior Court of California and here assailed is binding upon appellant, and that by it the latter has not been deprived of property "without due process of law."

Respectfully submitted,

GARRET W. MCENERNEY,
Amicus Curiæ.

WASHINGTON, D. C., *October*, 1910.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 230.

AMERICAN LAND COMPANY (A CORPORATION),
COMPLAINANT AND APPELLANT,

vs.

LOUIS ZEISS, DEFENDANT AND APPELLEE.

ABSTRACT OF CASE FOR USE ON ORAL ARGUMENT.

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vs.

LOUIS ZEISS, DEFENDANT AND APPELLEE.

ABSTRACT OF CASE FOR USE ON ORAL ARGUMENT.

The only question presented by the certificate is whether the legislation here involved

> "is violative of the Fourteenth Amendment to the Constitution of the United States, and whether by virtue of the decree rendered by the said Superior Court of the City and County of San Francisco [in the proceeding entitled 'Louis Zeiss *vs.* All Persons claiming any interest in, or lien upon, the real property herein described, or any part thereof, defendants'], the appellant has been deprived of its property without due process of law."

The case therefore presents *constitutional* questions only; it was not intended to raise or present questions of general jurisprudence.

In the brief of appellant facts are stated or suggested and arguments made which would imply that matters of law and fact are here involved which are not involved at all.

To the end that the questions which are properly here may be relieved from obscurity we propose, first, to set down the matters and questions which obtrude themselves in the brief of appellant, but which are not involved; and, after that, the propositions which are involved.

We proceed now to state:

The Matters and Propositions Not Involved in the Case.

1. It does not appear that Zeiss ever was the tenant of Lent or Coggeshall, predecessors in estate of the appellant.

2. It does not appear that the bill of complaint in this action alleges that Zeiss was, or ever had been, in possession of the real property involved.

3. It does not appear that Zeiss ever had possession of the premises involved, fiduciary to either Lent or Coggeshall.

4. It does not appear that during the pendency of Zeiss *vs.* All Persons, Zeiss owned the 99-year term. The certificate states that the bill of complaint alleges that Zeiss "is" the owner of the 99-year term; *i. e.*, was such owner at the filing of the bill of complaint in this action.

5. It does not appear that the possession of Zeiss (assuming for the moment that it appears that he ever had possession) is or ever was referable to the 99-year term, or to the remainder or reversion of estate; nor that Zeiss' possession (again assumed) was in subordination to these titles, nor that such possession was not in hostility to the 99-year term and to the said remainder or reversion.

6. It is admitted that Zeiss was guilty of no fraud in Zeiss vs. All Persons, for it is stated in the brief of appellant (p. 7) that:

> "The bill of complaint alleges no fraud against the respondent. The complainant has no evidence of fraud, and it is possible that the appellee here proceeded in the State court in the belief that he was asserting a right actually vested in him."

7. It does not appear that Zeiss did not believe in good faith that he was the owner in fee simple of the property involved.

8. It does not appear that Zeiss knew or had ever heard of the claims of Lent or Coggeshall, or knew or had ever heard that such claims, or any adverse claims, to the property were outstanding in persons to him unknown.

9. It does not appear that Zeiss did not use due diligence to discover unknown claims and unknown claimants.

10. It does not appear that if Zeiss had used due diligence he would have discovered that there were claims represented or held by Lent and Coggeshall, or any adverse claims.

11. It does not appear that the claims of Lent and Coggeshall were of record, or ever had been of record.

12. It appears that Lent and Coggeshall, predecessors in interest of the appellant, were, during the pendency of Zeiss *vs.* All Persons, citizens of California and, hence, that they would not have had any right to ask for the removal of the case from the State court to the Federal court, if they had appeared and desired such removal.

13. It is assumed in the certificate that the grant by the State of California to the City of San Francisco of the 99-year term was a lease. Whether that grant was a lease of the property or a grant of a particular estate for a term of years is a question which should not be foreclosed here or embarrassed by decision, or even by an assumption that it was a lease rather than a grant of a particular estate for a term of years.

In view of the foregoing matters, the consideration of this case should be stripped of all questions of general juris-

prudence: i. e., the effect of fraud committed in the procurement of a decree; the answerability of a tenant who takes advantage of his fiduciary possession to defraud his principal; when a court of equity will enjoin the enjoyment of a decree unconscionably obtained, and when a court of equity will adjudge the holder of such a decree to be an involuntary trustee for the true owner. (*See Supplemental Brief, p. 16.*)

Having now pointed out the matters resting in suggestion but which are not involved in the case, we next proceed to consider

The Questions Involved in the Case.

The appellant's objections to the legislation involved all turn upon the power of the State with respect to unknown claims and unknown claimants. There is no other subject matter presented in the case.

The objections which the appellant makes are four in number, and are now to be considered.

The Four Objections to the Act.

1. The due process clause implies a judicial proceeding. A judicial proceeding to bar unknown claims and unknown claimants involves a contradiction in terms and is legally impossible. A judicial proceeding necessarily involves a wrong committed against or injury inflicted upon a named plaintiff by a named defendant.

2. The essence of the notice required by the due process clause is a name, not a description of property. Hence it is impossible to give a notice to unknown claimants, or to bar persons sued by general designation.

In the brief for appellant (p. 57) it is said:

> "The McEnerney Act, we concede, gives sufficient *length* of notice (if the notice were a substantial

[To be read as immediately preceding the last line of page 5.]

The Question of "In Rem."

The legislature of California provided *in terms* that the proceeding here involved should be "an action *in rem* against all the world"; and it is our understanding (Brief of *Amici Curiæ*, p. 39) that the appellant concedes that none of his objections to the act has any validity if the legislature had *power* to make the proceeding one (strictly) "*in rem*."

We claim that the legislature had that power, and that upon counsel's concession his entire case fails.

We claim, furthermore, that the requirements of due process (a *judicial* proceeding, if one be necessary, notice reasonable under the circumstances of the case, opportunity to defend, and an impartial administration of the law in the course of the proceedings) are fully satisfied by the act, whether the proceeding thereunder be treated as one "strictly *in rem*," or (simply) "*in rem*," or "*quasi in rem*," or "*in rem sub modo*," or howsoever else the proceeding may be classified or named.

notice). We contend, however, that *the breadth of the notice is insufficient—that the act does not provide for anything which may properly be considered notice at all.*"

This simply means that you cannot serve a person by a notice wherein he is described by or included in general designation.

3. The third point relied upon by appellant is stated in the brief of appellant (p. 118). It is that the framers of the Federal Constitution, by giving to the Federal courts jurisdiction of controversies between citizens of different States, forever put it out of the power of a State to determine property rights in a non-adversary proceeding, or to conclude the rights of persons sued by general designation.

4. The fourth and last objection is that the act does not provide for due diligence in discovering unknown claimants, notwithstanding the fact that the Supreme Court of California has expressly decided that it does require due diligence and, notwithstanding, furthermore, that it is the established doctrine of general jurisprudence that the requirement to serve known claimants necessarily carries with it an obligation to serve all claimants unknown who could have been discovered by the use of reasonable diligence.

The foregoing are the four points upon which it is attempted to invalidate the legislation here involved.

It will be observed that the first three objections assume and depend for their validity upon the proposition that no State has power to adopt a law with respect to real property which shall effectively bar unknown claims and unknown claimants; while the fourth deals with the want of diligence in discovering these unknown claimants.

There is but one other matter to be considered.

Lastly.

It is claimed by us that while the remedy provided by the act is valid primarily as a judicial proceeding affording due process of law and resulting in a judgment conclusive on the world, the act is also valid regarded merely as establishing a statute of limitations, for by the terms of section 473 of the Code of Civil Procedure of California any person not personally served with summons is entitled, as a matter of absolute right, to come in within one year after decree, have the same set aside, and to plead to the case on its merits.

Conclusion.

It is submitted that the Circuit Court of Appeals should be instructed:

1. That the act involved does not violate the Fourteenth Amendment;

2. That neither the predecessors in estate of appellant, nor appellant, was deprived of property without due process of law by the decree in Zeiss *vs* All Persons; and

3. That (if it be regarded by this court as either necessary or appropriate so to say) whatever equities may happen to exist between the parties to this litigation, dehors the record in Zeiss *vs.* All Persons, and quite apart from the validity and binding effect of the proceedings in that case, the appropriate courts (either State or Federal, as the case may be) are open to them.

GARRET W. MCENERNEY,
Amicus Curiæ.

WASHINGTON, D. C., *October*, 1910.